Office-Supreme Court, U.S.
FILED
MAR 23 1981
ALEXANDER L. STEVAS,
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80-1608

No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

RAYMOND EUGENE JOHNSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WADE H. MCCREE, JR.
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

ELLIOTT SCHULDER
Assistant to the Solicitor General

JANIS H. KOCKRITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the exclusionary rule requires the suppression of evidence obtained following a warrantless entry into respondent's house in the course of arresting him on probable cause, where the entry occurred prior to this Court's decision in *Payton* v. *New York*, 445 U.S. 573 (1980), and the court of appeals' decision in *United States* v. *Prescott*, 581 F.2d 1343 (9th Cir. 1978).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Reasons for granting the petition	7
Conclusion	12
Appendix A	1a
Appendix B	12a
Appendix C	14a
Appendix D	23a
Appendix E	31a
Appendix F	32a

TABLE OF AUTHORITIES

Cases:

Payton v. *New York*, 445 U.S. 573 ..... 6, 7, 8, 9, 10, 11

Riddick v. *New York*, 445 U.S. 573 6

Steagald v. *United States*, No. 79-6777 (argued Jan. 14, 1981) 7, 11

Stone v. *Powell*, 428 U.S. 465 11

Stovall v. *Denno*, 388 U.S. 293 8

United States v. *Arboleda*, 633 F.2d 985, cert. denied, No. 80-954 (Feb. 23, 1981) .. 8

United States v. *Blake*, 632 F.2d 731 ..7, 9, 10, 11

United States v. *Calhoun*, 542 F.2d 1094, cert. denied, 429 U.S. 1064 9

United States v. *Peltier*, 422 U.S. 531 8

United States v. *Phillips*, 497 F.2d 1131 9

Cases—Continued: Page

United States v. *Prescott*, 581 F.2d 1343 ..... 5, 6, 7, 9, 10, 11

United States v. *Santana*, 427 U.S. 38 6

United States v. *Watson*, 423 U.S. 411 8

Constitution and statutes:

United States Constitution, Fourth Amendment 5, 6, 8, 9, 10, 11

18 U.S.C. 2 2

18 U.S.C. 641 2

18 U.S.C. 1703 2

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UNITED STATES OF AMERICA, PETITIONER

v.

RAYMOND EUGENE JOHNSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a–11a) is reported at 626 F.2d 753. The order amending that opinion (App. B, *infra*, 12a–13a) is not yet reported. The court of appeals' prior opinions (App. C, *infra*, 14a–22a; App. D, *infra*, 23a–30a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1980 (App. E, *infra*, 31a). A petition for rehearing was denied on December 29, 1980 (App. F,

infra, 32a). On February 20, 1981, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including March 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Central District of California, respondent was convicted of aiding and abetting the obstruction of correspondence, in violation of 18 U.S.C. 1703 and 2. Respondent's sentence was suspended in favor of five years' probation.[1]

1. Prior to trial, respondent moved to suppress certain statements that he had given to government agents on the day of his arrest. The district court denied the motion. The pertinent evidence is summarized in the opinion of the court of appeals (App. A, *infra*, 2a–4a). It showed that on March 30, 1977, Lena Kearney received in the mail a letter addressed to Elihu Peterson. The letter contained a United States Treasury check payable to Peterson in the amount of $4,681. Following discussions with her sister-in-law, Wynona Powell, Kearney decided to attempt to cash the check. Powell telephoned co-defendant Oscar Joseph Dodd to ask him for assistance in cashing the check. The next day respondent, Dodd

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[1] Respondent, together with co-defendant Oscar Joseph Dodd, was charged in a two-count indictment with aiding and abetting the obstruction of correspondence, and with receiving stolen government property, in violation of 18 U.S.C. 641. Respondent was convicted on the obstruction of correspondence count but was acquitted on the stolen property count. Dodd was convicted on both counts and appealed; the Ninth Circuit affirmed his conviction in a separate opinion.

and Eugene McCardell met at Kearney's house and discussed methods for cashing the check. After making a telephone call, respondent stated that he believed he had found someone who could help cash the check. The three men then took the check and departed.

Thereafter, in the course of investigating this matter, Special Agent Richard Hemenway of the United States Secret Service interrogated Kearney about the check. Kearney related that respondent, whom she identified from a photo spread, was one of three men who had participated in a discussion at her house on possible methods of cashing the check and that he had made a telephone call in an attempt to find someone to forge a signature on the check. Wynona Powell gave Agent Hemenway respondent's telephone number and explained that co-defendant Dodd had told her that he could be reached at that number. Agent Hemenway also learned that respondent had been named as one of Dodd's associates in Dodd's criminal history on file with the Los Angeles Police Department.

Hemenway and Special Agent William Pickering went to respondent's house on May 5, 1977. Although the agents had obtained a warrant for Dodd's arrest they had not obtained one for respondent. After watching the residence for a short time the agents observed respondent's car pull into respondent's driveway and the two occupants of the car enter respondent's residence. The agents then approached the door, drew their weapons, pointed them downward, and knocked, identifying themselves by fictitious names. When respondent opened the door, the agents introduced themselves as Secret Serv-

ice agents and asked to talk with him. Respondent told the agents to come inside.

Pickering stood with respondent in the living room, while Hemenway conducted a cursory check of the premises for persons who might present a danger to the agents. Hemenway discovered a woman during his search and asked her to go into the living room. Upon completing the search, which took between 15 and 30 seconds, the agents returned their weapons to their holsters.

At Hemenway's request respondent agreed to step into the bedroom to talk with him. Hemenway informed respondent of his constitutional rights and respondent agreed to cooperate. During the course of the discussion, respondent told Hemenway about his involvement with the Treasury check. The agents then informed respondent that he was under arrest. The agents and respondent left the residence and went to the police station, where respondent, after again being advised of his constitutional rights, signed a written statement detailing his involvement in the check cashing scheme.

2. On respondent's appeal, the court of appeals initially affirmed his conviction. In its first opinion, filed on December 19, 1978 (App. D, *infra*, 23a–30a), the court concluded that, even though the agents testified that they had not intended to effect an arrest when they initially entered respondent's residence, "[respondent's] arrest occurred immediately upon the entry of the agents into [respondent's] home" (*id.* at 26a).[2] The court

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[2]The court reasoned that, regardless of the agents' subjective intentions, the determination whether an arrest has occurred de-

nonetheless concluded that the motion to suppress respondent's statements was properly denied because the agents had sufficient probable cause to arrest respondent prior to their entry. While noting that "[i]t certainly would have been preferable had the agents obtained a warrant" for respondent's arrest before entering his residence, the court held that "if probable cause exists for the arrest, [respondent's] constitutional rights were not violated by the warrantless arrest, even though there may have been time to have obtained a warrant for his arrest" (*id.* at 26a–27a).

On August 20, 1979, the court of appeals issued an amended opinion (App. C, *infra*, 14a–22a), to address the applicability to this case of its decision in *United States* v. *Prescott*, 581 F.2d 1343 (9th Cir. 1978), which had held that a warrantless entry into a third party's residence to arrest a suspect on probable cause violated the Fourth Amendment.[3] The court concluded that respondent's arrest occurred, not after the agents' entry into his house, as it previously had found, but prior to the entry when respondent opened the door "and was first confronted by the agents with their guns drawn"

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pends upon an objective "evaluation of what a person innocent of a crime would have thought of the situation, given all of the factors involved" (App. D, *infra*, 25a–26a). In light of the facts that the agents were armed when they entered respondent's house and that their weapons remained drawn while one of the agents remained with respondent and the other searched the house, the court concluded that "a reasonable person, under those circumstances, would have thought that he was under arrest" (*id.* at 26a).

[3] Although *Prescott* had been decided on September 14, 1978, prior to the court's first opinion in this case, that opinion made no mention of *Prescott*.

(App. C, *infra*, 17a; see *id.* at 18a). Accordingly, the court held that respondent's subsequent statements were admissible because the arrest was valid under *United States* v. *Santana*, 427 U.S. 38 (1976) (App. C, *infra*, 18a). The court distinguished *Prescott* on the ground that that case involved a forcible entry to effect an arrest, whereas here respondent was arrested in the doorway and the agents' subsequent entry was at respondent's invitation (App. C, *infra*, 18a–19a).

Following this Court's decision in *Payton* v. *New York*, 445 U.S. 573 (1980), the court of appeals issued another opinion, this time reversing respondent's conviction (App. A, *infra*, 1a–11a). The court noted that unlike the situation in *Riddick* v. *New York*, the companion case to *Payton*, the agents in this case did not enter respondent's residence prior to effecting his arrest (App. A, *infra*, 7a). Nonetheless, relying on the "strong language" in *Payton* "emphasizing the special protection the Constitution affords to individuals within their homes" (App. A, *infra*, 7a), the court concluded that "it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home. Otherwise, arresting officers could avoid illegal 'entry' into a home simply by remaining outside the doorway and controlling the movements of suspects within through the use of weapons that greatly extend the 'reach' of the arresting officers" (*ibid.*). Accordingly, the court held that the warrantless arrest violated respondent's Fourth Amendment rights (*ibid.*).[4] Having

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[4]The court purported to distinguish the doorway arrest in this case from that in *United States* v. *Santana*, *supra*, on the ground that respondent did not voluntarily expose himself to

determined that the arrest was unlawful, the court went on to hold that respondent's confession should have been suppressed as a fruit of that arrest (*id.* at 8a–11a).

In response to the government's argument, in its petition for rehearing, that the principles of *Payton* should not be applied retroactively, the court of appeals revised its amended opinion to include a footnote explaining that its decision rested on the principles announced in *United States* v. *Prescott*, *supra*, and *Payton* v. *New York*, *supra* (App. B, *infra*, 12a–13a). Although respondent's arrest occurred prior to either of those decisions, the court pointed out that in *United States* v. *Blake*, 632 F.2d 731 (9th Cir. 1980), it had held that the rule of *Prescott* applied retroactively in the Ninth Circuit to arrest entries that occurred prior to *Prescott* (App. B, *infra*, 13a).

REASONS FOR GRANTING THE PETITION

This case presents the important question whether the principles announced in *Payton* v. *New York*, *supra*, are to be applied retroactively to exclude evidence obtained in the course of warrantless arrest entries that occurred before *Payton* was decided. The issue of the retroactivity of *Payton* is presently before the Court in *Steagald* v. *United States*, No. 79–6777 (argued Jan. 14, 1981).[5] For the reasons stated in our brief in *Steagald*, we believe that the court of appeals erred in applying

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public view but rather was induced to open his door when the agents misrepresented their identities (App. A, *infra*, 6a–7a).

[5] We are sending respondent's counsel a copy of our brief in *Steagald*.

the principles of *Payton* to suppress respondent's statements as the fruits of an unlawful arrest.[6]

At the time of respondent's arrest in May 1977, neither this Court nor the Ninth Circuit had held that the Fourth Amendment imposed a warrant requirement on officers making arrests inside private premises. The opinion in *Payton* marked a sharp break in this Court's decisions regarding arrest entries. Under settled principles, *Payton* should not be given retroactive effect. See *United States* v. *Peltier*, 422 U.S. 531 (1975); *Stovall* v.

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[6]We do not agree with the court of appeals' conclusion that if *Payton* is to be given retroactive effect, respondent's statements must be suppressed. The Court in *Payton* did not hold that a home is a sanctuary where a suspect is immune from warrantless arrest. Rather, *Payton* established that, absent exigent circumstances, law enforcement officers violate the Fourth Amendment when they invade the privacy of the home without prior judicial approval in order to make an arrest. If an arrest can be effected without an unconsented entry, the homeowner's Fourth Amendment rights have not been infringed, in the same way that the owner's rights are not violated when the police, without making any physical entry into the home, seize a package of contraband tossed out the window in response to their knock on the door. See *United States* v. *Arboleda*, 633 F.2d 985, 991-992 (2d Cir. 1980), cert. denied, No. 80-954 (Feb. 23, 1981). Because the agents had probable cause to arrest respondent, the arrest itself, even without a warrant, was proper. *United States* v. *Watson*, 423 U.S. 411 (1976). Moreover, even if respondent cannot be said to have voluntarily consented to the subsequent entry into his house, his statements were a product not of the arguably unlawful entry but of the lawful arrest. While we believe that the court of appeals' rulings on both the substantive Fourth Amendment issue and the fruits issue are incorrect, we have not raised those issues as separate questions warranting review because in the particular factual setting of this case it is unclear whether respondent's arrest took place at the doorway or subsequent to the agents' entry, and it is also uncertain whether or not respondent validly consented to the entry.

Denno, 388 U.S. 293, 297 (1967). No possible deterrent purpose would be served by excluding the fruits of warrantless arrest entries that law enforcement officers did not know, and could not reasonably be charged with knowing, were proscribed by the Fourth Amendment. Furthermore, the extent of reliance on the pre-*Payton* rule allowing warrantless arrest entries—a practice referred to in *Payton* as "longstanding" and "widespread" (445 U.S. at 600)—and the burden on the administration of justice that would flow from retroactive application both suggest that *Payton* should apply prospectively only.

For similar reasons, the court below erred in concluding, in reliance on *United States* v. *Blake*, *supra*, that the Ninth Circuit's decision in *Prescott* should be given retroactive effect. In *Blake*, the court held that the result in *Prescott* had been "'clearly foreshadowed'" (632 F.2d at 735). The court noted that in two pre-*Prescott* cases (*United States* v. *Calhoun*, 542 F.2d 1094, 1102 (1976), cert. denied, 429 U.S. 1064 (1977); *United States* v. *Phillips*, 497 F.2d 1131, 1135 (1974)) it had suggested that a warrant might well be required to justify an entry into private premises to effect an arrest.[7] Although it ac-

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[7] In *Calhoun*, the government conceded that, absent exigent circumstances, an arrest warrant was required before law enforcement officers could enter defendant Sheppard's apartment in order to effect his arrest (542 F.2d at 1102). Since no exigent circumstances were present, the court held that evidence seized as a result of the entry should have been suppressed (*id.* at 1102–1103). In *Phillips*, the court concluded that the entry was unlawful because the agents lacked probable cause to believe that the defendant was inside the premises at the time of the entry (497 F.2d at 1136).

knowledged that neither *Calhoun* nor *Phillips* actually held that a warrant was required and that prior to *Prescott* it had "avoided the issue repeatedly either by finding that probable cause to arrest was lacking or, when not lacking, that exigent circumstances existed," the court concluded that its persistent avoidance of the issue should have signalled to law enforcement officers that the issue might be decided adversely to the government and that this was sufficient to constitute a clear foreshadowing of the decision in *Prescott*. 632 F.2d at 735-736.

The Ninth Circuit's decision in *Blake* that *Prescott* should be applied retroactively and the court's retroactive application of *Prescott* to suppress evidence in this case are plainly wrong. In its initial opinion, issued three months after *Prescott* was decided, the court below upheld the warrantless entry into respondent's house (App. D, *infra*). If the panel of judges in this very case was not aware even after *Prescott* that a warrant was required to uphold arrest entries that occurred prior to *Prescott*, it is difficult, if not impossible, to conclude that law enforcement officers in May 1977 should have known of the impending change in the law. Thus, the same analysis that applies to the retroactivity of this Court's decision in *Payton* also applies to the retroactivity of the Ninth Circuit's decision in *Prescott*. Under that analysis, neither *Payton* nor *Prescott* should be given retroactive effect, and the court of appeals therefore erred in applying to this case the principles it distilled from those decisions.

We recognize that the question whether a previous decision establishing a new Fourth Amendment principle

governing law enforcement conduct may, in some sense, be characterized as one of diminishing importance, since law enforcement officers can be expected to adhere to the new standards, and there is little danger that defendants with Fourth Amendment claims whose convictions have already been upheld on direct appeal will succeed in overturning their convictions on collateral attack. See *Stone* v. *Powell*, 428 U.S. 465 (1976). In addition, we realize that the question whether a court of appeals' decision should be given retroactive effect is ordinarily not of sufficient importance to warrant this Court's review. But the decision of the court of appeals in this case holding *Payton* and *Prescott* retroactive is methodologically unsound and is inconsistent with a proper understanding of the policies underlying the Fourth Amendment's exclusionary rule. The errors underlying *Blake* and the instant case will infect subsequent decisions on the retroactivity of other new Fourth Amendment rulings. It is important for this Court to ensure that the courts of appeals employ a sound analytical approach in deciding basic Fourth Amendment questions, including the retroactivity question presented here.

Because the issue of the retroactivity of *Payton* is presently under submission in *Steagald*, we submit that the Court should defer consideration of this petition pending its decision in *Steagald*. If the Court determines in *Steagald* that *Payton* is not to be applied retroactively, the Court should grant this petition, vacate the judgment of the court of appeals and remand this case to that court for further consideration in light of *Steagald*. If the Court does not decide the retroactivity issue in

Steagald, the Court should grant this petition in order to resolve the issue.

CONCLUSION

The Court should defer disposition of this petition for a writ of certiorari pending its decision in *Steagald* v. *United States* and should then dispose of the petition as appropriate in light of that decision.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

ELLIOTT SCHULDER
Assistant to the Solicitor General

JANIS H. KOCKRITZ
Attorney

MARCH 1981

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

UNITED STATES OF AMERICA
APPELLEE,

v.

RAYMOND EUGENE JOHNSON,
APPELLANT

No. 77-3808

Argued and Submitted October 10, 1978.
Decided September 2, 1980.

Appeal from the United States District Court
For the Central District of California.

ORDER

Before ANDERSON and HUG, *Circuit Judges*, and EAST*, *District Judge.*

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*Honorable William G. East, United States District Judge for the District of Oregon, sitting by designation.

HUG, *Circuit Judge:*

Appellant, Raymond Eugene Johnson, was convicted in a jury trial of aiding and abetting the obstruction of correspondence, a violation of 18 U.S.C. § 1703 and 18 U.S.C. § 2. Johnson appeals on the ground that statements made by him on the day of his arrest should have been suppressed for the reason that the arrest was illegal and the statements were products of the illegal arrest and not voluntarily made, and on the further ground that the judge committed error in instructing the jury concerning the voluntariness of appellant's confession. We reverse.

FACTS

On March 30, 1977, Lena Kearney received by mistake in the mail a letter addressed to Elihu Peterson, containing a United States Treasury check payable to Peterson, in the amount of $4,681.00. Kearney discussed the receipt of this check with her sister-in-law, Wynona Powell, and decided to keep the check and attempt to cash it. Powell then phoned a friend, Joe Dodd, to ask him for assistance in cashing the check. On the following day, Dodd arrived at the Kearney residence with Eugene McCardell and Raymond Johnson, the appellant. The three men seated themselves around a coffee table in Kearney's living room and studied the check. Johnson picked up the check and made a telephone call. During this call he discussed the check and the difficulty of cashing the check because of the age of the payee. Johnson then returned after completing the call and stated that he believed he had someone who could assist them in cashing the check. Dodd, Johnson and McCardell then left the Kearney residence and took the check with them.

Special Agent Richard Hemenway of the United States Secret Service commenced investigating this matter. He interrogated Lena Kearney, who told them that appellant Johnson was one of three men who came to her house for the check and participated in a general discussion as to how to cash the check. She further stated that Johnson made a telephone call in an attempt to find someone to forge the check. Kearney also identified Johnson from a photo spread as the

person who had come to her house. Wynona Powell gave Agent Hemenway appellant Johnson's telephone number, which she stated had been given to her by Dodd as the number at which Dodd could be contacted. Upon checking with the Los Angeles Police Department, Agent Hemenway discovered that Johnson was named in the criminal history files as an associate of Dodd in Dodd's criminal history. Special Agent Hemenway did obtain a warrant for the arrest of Dodd, based on the above and other information obtained through investigation. A warrant for the arrest of Johnson was not obtained.

Special Agent Hemenway and Special Agent William Pickering went to the Johnson house on May 5, 1977, at approximately 6:00 P.M. The agents watched the house for a short period and Agent Pickering saw Johnson's vehicle, with two persons inside, pull up to the driveway of Johnson's house. The two agents then approached the doorway, drew their weapons, pointed them downward and knocked, at first identifying themselves by fictitious names. When Johnson opened the door, Hemenway introduced himself and Pickering as special agents and asked to talk with Johnson. Johnson told the agents to come in. Pickering then stood in the living room with Johnson, while Hemenway looked into the other rooms for other people who might be in the house and present a possible danger to the agents. A woman was discovered during the search and was asked to go into the living room. After Hemenway finished looking into the rooms, which took between 15–30 seconds, he told Pickering that everything was secure. Pickering and Hemenway then returned their weapons to their holsters.

Hemenway then asked Johnson if he would step into the bedroom to talk with him, and Johnson agreed. Before entering the bedroom, Hemenway informed Johnson of his constitutional rights. Johnson responded that he wished to cooperate and then told Hemenway of his involvement in taking the Treasury check. Johnson was then told that he was under arrest. The agents and Johnson left the residence and went to the police station. At the station, Johnson was again advised of his constitutional rights and stated that he

understood them. He told Pickering of his involvement with the check while Pickering wrote out the statement. Johnson read the statement, made changes and initialed them. He was placed under oath by Pickering and signed the statement.

Legality of the Arrest

The two special agents testified that they had not intended to effect an arrest at the time they initially entered the residence of appellant Johnson. It was their belief that an arrest had not occurred until after the interview with Johnson. However, whether an arrest had occurred depends upon an objective, not subjective, evaluation of what a person innocent of a crime would have thought of the situation, given all of the factors involved. When an arrest has occurred depends in each case upon an evaluation of all the surrounding circumstances. Primary among these is a determination of whether or not the defendant was free to choose between terminating or continuing the encounter with the law enforcement officers. *See Sibron v. New York*, 392 U.S. 40, 67, 88 S.Ct. 1889, 1904, 20 L.Ed.2d 917 (1968); *United States v. Sanudo-Perez*, 564 F.2d 1288, 1290 (9th Cir. 1978); *accord*, *United States v. Beck*, 598 F.2d 497 (9th Cir. 1979).

From a review of all of the circumstances surrounding the encounter between Johnson and the special agents, we find that appellant's arrest occurred as he stood within his home at the doorway of his home and was first confronted by the agents with their guns drawn. The agents then entered the home with their guns still drawn until the search of the home had been concluded. Johnson was held in the living room while the house was searched. One of the agents remained with Johnson at all times. It is extremely doubtful that Johnson would have believed that he was free to leave at any time or to request the officers to leave after the initial encounter. A reasonable person, under those circumstances, would have thought that he was under arrest.

We must determine whether, even assuming that probable cause existed, the arrest of Johnson in his doorway without first obtaining a warrant violated his Fourth Amend-

ment rights. A warrantless arrest of an individual in a public place upon probable cause does not violate the Fourth Amendment, even though exigent circumstances may not exist. *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976).

In *United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976), the Supreme Court upheld the warrantless arrest of a defendant who was standing within the frame of her doorway as the officers approached and who then retreated into the vestibule of her home where the officers followed and effected the arrest. The Court held that once the defendant was exposed to public view in her doorway, her act of retreating into her house could not thwart an otherwise proper arrest by officers who pursued her inside. The Ninth Circuit has applied the holding of *Santana* and has upheld the legality of a warrantless arrest of a defendant as he stood in the doorway of his home, *United States v. Botero*, 589 F.2d 430 (9th Cir. 1978), *cert. denied*, 441 U.S. 944, 99 S.Ct. 2162, 60 L.Ed.2d 1045 (1979). In that case, Botero, under surveillance by federal officers, was followed to his home. Officers knocked on the front door, which was opened by Botero, and Botero was placed under arrest while he stood in the doorway.

Most recently, in *Payton v. New York*, ___ U.S. ___, 100 S.Ct. 1371, 1375, 63 L.Ed.2d 639 (1980), the Supreme Court held that the Fourth Amendment "prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest." The appeal involved a consolidation of two cases on appeal from the New York Court of Appeals and challenged the constitutionality of a New York statute authorizing police officers to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest. In each case the police officers, acting with probable cause but without a warrant, had entered the appellant's premises to make an arrest. In the case of appellant Theodore Payton, the officers broke into the appellant's apartment when there was no response to their knock on the door. No one was there, but they seized evidence which was in plain view and which was

later admitted in evidence at his trial for murder. In the case of Obie Riddick, the officers knocked on the door of the house where Riddick was living. His three-year-old son opened the door, allowing the officers to see Riddick sitting in bed. They entered the house and placed him under arrest.

The Court held the arrests in both cases to be illegal because of the warrantless nonconsensual entry into the homes of the appellants. The Court emphasized the significance of the boundaries of the dwelling:

> But the critical point is that any differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind. The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home. The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable Government intrusion." *Silverman v. United States*, 365 U.S. 505, 511 [81 S.Ct. 679, 682, 5 L.Ed.2d 734]. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

___ U.S. at _____, 100 S.Ct. at 1381–82.

This case can be distinguished from both *Santana* and *Botero*. In *Santana* the suspect was in full view in the doorway as the officers approached. In *Botero* there was no subterfuge in getting the suspect to open the door; furthermore, exigent circumstances existed. In contrast, Johnson opened the door of his dwelling after the agents misrepresented their identities; thus, Johnson's initial exposure to the view and the physical control of the agents was not consensual on

his part. *Cf. Payton*, ___ U.S. at ___, 100 S.Ct. at 1378 (entries were similarly nonconsensual). Moreover, Johnson's invitation to the agents to enter after the door was opened was hardly voluntary in light of the coercive effect of the weapons brandished by the agents.

This case, on the other hand, differs from both of the situations addressed in *Payton*. The illegal search of Payton's home and the illegal arrest of Riddick did not occur until the police had entered the suspect's homes. ___ U.S. at ___ ___, 100 S.Ct. at 1374–76. In this case, we are confronted with the situation where the suspect was arrested as he stood inside his home and the officers stood outside his home with drawn weapons. In these circumstances, it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home. Otherwise, arresting officers could avoid illegal "entry" into a home simply by remaining outside the doorway and controlling the movements of suspects within through the use of weapons that greatly extend the "reach" of the arresting officers.

The *Payton* decision held that in the case of Obie Riddick the warrantless entry of the Riddick's home by police officers to arrest Riddick was not justified when his three-year-old son opened the door and they could see him sitting in bed. We doubt the Supreme Court would have reached a different result had the police stood at the doorway and immediately placed Riddick under arrest with weapons drawn.

The case rather closely parallels that of the *Riddick* case discussed in *Payton*. Riddick did not voluntarily expose himself to warrantless arrest by the police as in a public place by allowing his three-year-old son to open the door of his home. Similarly, it cannot be said that Johnson voluntarily exposed himself to warrantless arrest by opening his door to agents who misrepresented their identities. In light of the strong language by the Court in *Payton* emphasizing the special protection the Constitution affords to individuals within their homes, we find that the warrantless arrest of Johnson, while he stood within his home, after having opened the door in response to false identification by the agents, constituted a violation of his Fourth Amendment rights.

Fruits of the Arrest

The final question is whether the statements made by Johnson after his arrest were fruits of the unlawful arrest. The first statement was given by Johnson in his bedroom after he had been given his *Miranda* warnings but before he was formally told he was under arrest. In that statement, he admitted his involvement in taking the Treasury check. After having been placed formally under arrest he was taken to the police station where he was again given a *Miranda* warning before he signed a similar written statement under oath.

In *Brown v. Illinois*, 422 U.S. 590, 603, 95 S.Ct. 2254, 2261, 45 L.Ed.2d 416 (1975) the Supreme Court held that "*Miranda* warnings, *alone* and *per se*, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession."

Therefore, a determination that statements made after *Miranda* warnings were "voluntary" for purposes of the Fifth Amendment merely meets the "threshold requirement" for Fourth Amendment analysis. *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 2259, 60 L.Ed.2d 824 (1980); *United States v. Perez-Esparza*, 609 F.2d 1284, 1288 (9th Cir. 1980).

The Court in *Dunaway* elaborated on the *Brown* doctrine stating:

> *Brown* articulated a test designed to vindicate the "distinct policies and interests of the Fourth Amendment." Following *Wong Sun* [*v. U.S.*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441], the court eschewed any *per se* or "but for" rule, and identified the relevant inquiry as "whether Brown's statements were obtained by exploitation of the illegality of his arrest." *Brown's* focus on "the causal connection between the illegality and the confession," reflected the two policies behind the use of the exclusionary rule to effectuate the Fourth Amendment. When there is a close causal connection between the illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police

> misconduct in the future, but use of the evidence is more likely to compromise the integrity of the courts.

Dunaway, 99 S.Ct. at 2259 (citations omitted).

The three factors identified in *Brown* in determining whether the statements were obtained by exploitation of an illegal arrest were:

(1) the temporal proximity of the statements and the arrest;

(2) the presence of any intervening circumstances; and,

(3) the purpose and flagrancy of the official misconduct.

Brown, 442 U.S. at 603–04, 95 S.Ct. at 2261–62. The focus of these factors as emphasized in *Dunaway* is the "causal connection" between the illegal detention. The first two factors, "temporal proximity" and "the presence of intervening circumstances," clearly pertain to the determination of whether the defendant supplied the evidence of his own free will, apart from any compulsion caused by the illegal detention. The attenuation which we analyze is the degree of causal remoteness between the illegal detention and the evidence obtained from the defendant.

The third factor, "the purpose and flagrancy of the official misconduct," could arguably be viewed as a broad general factor utilized to assess whether the flagrancy of police misconduct justifies the exclusion of the evidence in light of the deterrence rationale of the exclusionary rule. *See Dunaway*, 99 S.Ct. at 2263 (dissenting opinion of Rehnquist, J.), *Perez-Esparza*, 609 F.2d at 1289–91.

However, the Court appears instead to apply the third factor along with the first two factors in determining the degree of causal remoteness. Justice Stevens in his concurring opinion in *Dunaway* stresses this point, stating:

> The flagrancy of the official misconduct is relevant, in my judgment, only insofar as it has a tendency to motivate the defendant. . . . [I]f the Fourth Amendment is violated, the admissibility question will turn on the causal relationship between the violation and the defendant's subsequent confession.

Dunaway, 99 S.Ct. at 2260 (citations also omitted). The majority opinion in *Dunaway* repeatedly emphasizes that it is

the "causal connection" that is the relevant inquiry in making the attenuation determination. The majority opinion affords only brief consideration to the "purpose and flagrancy" factor in that case. A reasonable explanation is that the close causal connection between the illegal detention and the evidence obtained from defendant Dunaway was apparent from consideration of the temporal proximity and the lack of intervening circumstances, even though the conduct of the police was not especially flagrant.

The statement of Johnson given to Agent Hemenway in his bedroom, in which he admitted his involvement in taking the Treasury check, was made within ten minutes after the entry and, as in *Dunaway*, "[n]o intervening events broke the connection between petitioner's illegal detention and the confession." *Dunaway*, 99 S.Ct. at 2260. The later statement at the police station was substantially in accord with his earlier statement. This later statement was clearly the result and fruit of the first. *See Brown*, 422 U.S. at 605, 95 S.Ct. at 2262. Having given one statement which inculpated him in the crime, he had already committed himself; there was little incentive to withhold a repetition of it. He had been advised that the first statement could be used against him, and thus, the second statement confirming the first has a close causal connection to the first. The second statement was given within an hour or two of the first and there were no intervening circumstances of significance other than being given an additional *Miranda* warning at the station.[1] The first two *Brown* factors clearly indicate that the causal relationship between the illegal arrest and the incriminating statements was so close as to require the conclusion that

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[1]The Government argues that Johnson was permitted to drive his own automobile to the police station. Thus, Johnson did have a brief time away from the agents, but he went directly to the station, he did not consult an attorney or anyone else, and he was keenly aware that he had just admitted his involvement in the crime. He was not free to leave, but was required to go directly to the police station. Thus, he was not free from police influence for any significant period as in *Wong Sun*.

Johnson's statements were "obtained by exploitation of the illegality of his arrest," *Dunaway*, 99 S.Ct. at 2259.

The third factor, "the purpose and flagrancy of the police misconduct" could be particularly important in some cases in influencing the suspect to make statements after an illegal arrest. However, in this instance, as in *Dunaway*, it was not. The close causal relationship between the illegal arrest and the statements established by the first two factors require the conclusion that Johnson's statements were "obtained by exploitation of the illegality of his arrest," *Dunaway*, 99 S.Ct. at 2259. Therefore, the statements should have been suppressed, and we reverse on that ground; we need not consider the remaining grounds for appeal.

REVERSED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

RAYMOND EUGENE JOHNSON,
DEFENDANT-APPELLANT.

Filed December 29, 1980

No. 77-3808

ORDER

Before: ANDERSON and HUG, *Circuit Judges*, and EAST*, *District Judge*

The panel has voted unanimously to revise the Amended Opinion as follows:

Page 5, lines 25–29 with the word "a" on line 30 are deleted and replaced with:

> A few months prior to our decision in *Botero* we held that "absent exigent circumstances, police who have probable cause to arrest a felony suspect must obtain a warrant before entering a dwelling to carry out the arrest." *United States v. Prescott*, 581 F.2d 1343, 1350 (9th Cir. 1978). The Supreme Court recently came to a similar conclusion in *Payton v. New York*, 100 S.Ct. 1371 (1980). In *Payton*, the Court held that the Fourth Amendment "prohibits the police from making a warrantless and non consensual entry into a suspect's home in order to make a routine felony arrest." Id. at 1375. The appeal in *Payton* involved a

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*The Honorable William G. East, United States District Judge for the District of Oregon, sitting by designation.

Place the signal for footnote 1 after the word "rights" on page 8, line 17. Footnote 1 appearing on line 18, page 11 is changed to footnote 2. The text of footnote 1 will read:

> Our decision today rests chiefly upon basic principles common to our decision in *Prescott* and that of the Supreme Court in *Payton*. We have held the rule announced in *Prescott* to apply retroactively in this circuit to suspects arrested prior to the *Prescott* decision. *United States v. Blake*, No. 79–1078, slip op. 4586 (9th Cir. Aug. 7, 1980). Consequently, though Johnson was arrested prior to our decision in *Prescott*, we apply to this case the warrant requirement confirmed in *Prescott* and *Payton*.

APPENDIX C

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

AMENDED OPINION

No. 77-3808.

UNITED STATES OF AMERICA,
APPELLEE,

v.

RAYMOND EUGENE JOHNSON,
APPELLANT

Dec. 19, 1978.

Rehearing and Rehearing En banc
Denied August 20, 1979

Appeal from the United States District Court for the Central District of California.

Before ANDERSON and HUG, *Circuit Judges*, and EAST*, *District Judge*.

HUG, *Circuit Judge:*

Appellant, Raymond Eugene Johnson, was convicted in a jury trial of aiding and abetting the obstruction of correspondence, a violation of 18 U.S.C. § 1703 and 18 U.S.C. § 2. Johnson appeals on the ground that statements made by him on the day of his arrest should have been suppressed for the reason that the arrest was illegal and the statements were products of the illegal arrest and not vol-

*The Honorable William G. East, United States District Judge for the District of Oregon, sitting by designation.

untarily made, and on the further ground that the judge committed error in instructing the jury concerning the voluntariness of appellant's confession. We affirm.

FACTS

On March 30, 1977, Lena Kearney received by mistake in the mail a letter addressed to Elihu Peterson, containing a United States Treasury check payable to Peterson, in the amount of $4,681.00. Kearney discussed the receipt of this check with her sister-in-law, Wynona Powell, and decided to keep the check and attempt to cash it. Powell then phoned a friend, Joe Dodd, to ask him for assistance in cashing the check. On the following day, Dodd arrived at the Kearney residence with Eugene McCardell and Raymond Johnson, the appellant. The three men seated themselves around a coffee table in Kearney's living room and studied the check. Johnson picked up the check and made a telephone call. During this call he discussed the check and the difficulty of cashing the check because of the age of the payee. Johnson then returned after completing the call and stated that he believed he had someone who could assist them in cashing the check. Dodd, Johnson and McCardell then left the Kearney residence and took the check with them.

Special Agent Richard Hemenway of the United States Secret Service commenced investigating this matter. He interrogated Lena Kearney, who told him that appellant Johnson was one of three men who came to her house for the check and participated in a general discussion of how to cash the check. She further stated that Johnson made a telephone call in an attempt to find someone to forge the check. Kearney also identified Johnson from a photo spread as the person who had come to her house. Wynona Powell gave Agent Hemenway appellant Johnson's telephone number, which she stated had been given to her by Dodd as the number at which Dodd could be contacted. Upon checking with the Los Angeles Police Department, Agent Hemenway discovered that Johnson was named in the crim-

inal history files as an associate of Dodd in Dodd's criminal history. Special agent Hemenway did obtain a warrant for the arrest of Dodd, based on the above and other information obtained through investigation. A warrant for the arrest of Johnson was not obtained.

Special Agent Hemenway and Special Agent William Pickering went to the Johnson house on May 5, 1977, at approximately 6:00 P.M. The agents watched the house for a short period and Agent Pickering saw Johnson's vehicle, with two persons inside, pull up to the driveway of Johnson's house. The two agents then approached the doorway, drew their weapons, pointed them downward and knocked, at first identifying themselves by fictitious names. When Johnson opened the door, Hemenway introduced himself and Pickering as special agents and asked to talk with Johnson. Johnson told the agents to come in. Pickering then stood in the living room with Johnson, while Hemenway looked into the other rooms for other people who might be in the house and present a possible danger to the agents. A woman was discovered during the search and was asked to go into the living room. After Hemenway finished looking into the rooms, which took between 15–20 seconds, he told Pickering that everything was secure. Pickering and Hemenway then returned their weapons to their holsters.

Hemenway then asked Johnson if he would step into the bedroom to talk with him and Johnson agreed. Before entering the bedroom, Hemenway informed Johnson of his constitutional rights. Johnson responded and stated that he wished to cooperate and then told Hemenway of his involvement in taking the Treasury check. Johnson was then told the he was under arrest. The agents and Johnson left the residence and went to the police station. At the station, Johnson was again advised of his constitutional rights and stated that he understood them. He told Pickering of his involvement with the check, while Pickering wrote out the statement. Johnson read the statement, made changes and initialed them. He was placed under oath by Pickering and signed the statement.

LEGALITY OF THE ARREST AND VOLUNTARINESS OF THE CONFESSION

It was the testimony of the two special agents that they had not intended to effect an arrest at the time they initially entered the residence of appellant Johnson. It was their belief that an arrest had not occurred until after the interview with Johnson. However, whether an arrest has occurred depends upon an objective, not subjective, evaluation of what a person innocent of a crime would have thought of the situation, given all of the factors involved. When an arrest has occurred depends in each case upon an evaluation of the surrounding circumstances. Primary among these is a determination of whether or not the defendant was free to choose between terminating or continuing the encounter with the law enforcement officers. *Sibron v. New York*, 392 U.S. 40, 67, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968); *United States v. Sanudo-Perez*, 564 F.2d 1288, 1290 (9th Cir. 1977); *accord*, *United States v. Beck*, 598 F.2d 497 (9th Cir. 1979).

From a review of all of the circumstances surrounding the encounter between Johnson and the special agents, we find that appellant's arrest occurred as he stood in the doorway of his home and was first confronted by the agents with their guns drawn. The agents then entered the home with their guns still drawn until the search of the home had been concluded. Johnson was held in the living room while the house was searched. One of the agents remained with Johnson at all times. It is exremely doubtful that Johnson would have believed that he was free to leave at any time or to request the officers to leave after the initial encounter. A reasonable person, under those circumstances, would have thought that he was under arrest.

We must first determine whether, even assuming that probable cause existed, the arrest of Johnson in his doorway without first obtaining a warrant violated his Fourth Amendment rights. A warrantless arrest of an individual in a public place upon probable cause does not violate the Fourth Amendment, even though exigent circumstances

may not exist. *United States* v. *Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976).

In *United States* v. *Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976), the Supreme Court upheld the warrantless arrest of a defendant who was standing in her doorway as the officers approached and then retreated into the vestibule of her home where the officers followed and effected the arrest. The Court held that once the defendant was exposed to public view in her doorway, her act of retreating into her house could not thwart an otherwise proper arrest by officers who pursued her inside. The Ninth Circuit, in a case similar to the present one, has applied the holding of *Santana* and has upheld the legality of an arrest of a defendant as he stood in the doorway of his home. In *United States* v. *Botero*, 589 F.2d 430 (9th Cir. 1978), Botero, under surveillance by federal officers, was followed to his home. Officers knocked on the front door, which was opened by Botero, who was placed under arrest while he stood in the doorway. We held that the arrest did not violated the Fourth Amendment rights of Botero. We stated that under *Santana* the officers would have been justified in following Botero into his apartment to arrest him.

Johnson, when arrested, was standing in the doorway of his home, exposed to public view, having opened his front door voluntarily. Although the agents did not formally arrest Johnson, the totality of the circumstances indicate that Johnson was under arrest at that point. Under *Botero*, the subsequent entry of the agents into Johnson's home at his invitation cannot be held to invalidate the arrest under the Fourth Amendment.

The present case is distinguishable from this court's prior decision in *United State* v. *Prescott*, 581 F.2d 1343 (9th Cir. 1978). In *Prescott*, Government agents knocked on the door of a third person's apartment and were refused entry. The officers eventually kicked in the door to obtain entry, searched out the defendant who was hiding inside and arrested him. The court held that, absent exigent circumstances, the forced entry to effect the arrest was unconstitutional.

The defendant in this case responded to the agent's knock by opening the door to his home. Agents did not enter the home to arrest Johnson; his arrest took place at the doorway. The subsequent entry into the home was at Johnson's invitation. Although Johnson was under arrest at that time, and the invitation can hardly be considered voluntary, it differs markedly from a forced entry into a home to effect an arrest therein.

We next consider whether probable cause existed prior to the time of the arrest. The special agents had received information from Lena Kearney and Wynona Powell that Johnson had been present with Dodd and McCardell at the Kearney residence when the check was viewed and cashing of it through a forged signature was discussed. They also knew that Johnson had placed a telephone call in an attempt to find someone to forge the check. They had already obtained sufficient information to obtain a warrant for the arrest of Dodd. They had information that Johnson was tied in with Dodd, by the fact that Dodd had given Johnson's telephone number as the place where he could be reached, and by the fact that the Los Angeles police files recorded Johnson as having been implicated in some of Dodd's previous criminal history. Johnson had also been identified from a photo spread.

Although the district judge indicated at certain portions of the record that he did not believe that probable cause existed for the arrest at the time of the initial entry into the Johnson residence, this was not squarely addressed or analyzed by the judge, for the reason that he found that the arrest did not occur until the agents specifically told Johnson that he was under arrest. It was conceded by the attorney for the appellant at oral argument that this is a matter which, under these circumstances, should be reviewed *de novo* by the appellate court.

The facts and circumstances within the knowledge of the agents, of which they had reasonably trustworthy information, were sufficient to warrant a prudent person's belief that the petitioner had committed a criminal offense, under the standards of *Beck* v. *Ohio*, 379 U.S. 89, 85 S.Ct. 223,

13 L.Ed.2d 142 (1964). Information which comes from a known perpetrator of a federal crime, such as Kearney and Powell, concerning another who is involved with the perpetrator, is generally entitled to a greater weight than mere hearsay information concerning an alleged offense. *Wooten* v. *United States*, 380 F.2d 230, 232 (5th Cir. 1967). Probable cause existing, the arrest of the appellant at the doorway of his residence did not violate his constitutional rights.

Having determined the legality of the arrest and that the defendant was advised of his constitutional rights pursuant to *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), we must next consider appellant's argument that the confessions were not voluntary. Appellant contends that the oral and written statements were the result of psychological pressure and confusion generated by the custodial setting, coupled with Johnson's desire to cooperate with the agents so that he would be released on bail.

In addition to meeting the requirements set forth in *Miranda*, statements made by a defendant, in order to be admissible, must also be the product of a free and rational choice, as evidenced by the "totality of the circumstances" surrounding the statement. *Greenwald* v. *Wisconsin*, 390 U.S. 519, 521, 88 S.Ct. 1152, 20 L.Ed.2d 77 (1968); *Davis* v. *North Carolina*, 384 U.S. 737, 740, 86 S.Ct. 1761, 16 L.Ed.2d 895 (1966). The test for the voluntariness of a confession was set out by the United States Supreme Court in *Bram* v. *United States*, 168 U.S. 532, 542–43, 18 S.Ct. 183, 42 L.Ed. 568 (1897) and reiterated in *Hutto* v. *Ross*, 429 U.S. 28, 30, 97 S.Ct. 202, 203, 50 L.Ed.2d 194 (1976):

> The test is whether the confession was "extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence".

There is little in the record to support appellant's contention that the confessions were not voluntary. Viewing the evidence as a whole in the light most favorable to the Government, as required by *Glasser* v. *United States*, 315 U.S.

60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942), we agree with the findings of the trial court that the confessions were voluntarily given.

JURY INSTRUCTIONS

The trial court instructed the jury as to its consideration of the confession as follows:

> If it appears from the evidence in the case that a defendant has made a confession or admission you are instructed that you shall give such confession or admission such weight as you feel it warrants under all the circumstances shown by the evidence in the case as to whether it was voluntarily made or involuntarily made. Only if you find that the confession or admission was voluntarily made can you consider it as evidence respecting guilt or innocence of the defendant who has made such confession or admission.

Appellant's requested instruction which the trial court declined to give stated:

> If it appears from the evidence in the case that a confession (admission) would not have been made, but for some threat of harm or some offer or promise of immunity from prosecution, or leniency in punishment, or other reward, such a confession should not be considered as having been voluntarily made, because of the danger that a person accused might be persuaded by the pressure of hope or fear to confess as facts things which are not true, in an effort to avoid threatened harm or punishment, or to secure a promised reward.
>
> If the evidence in the case leaves the jury with a reasonable doubt as to whether a confession was voluntarily made, then the jury should disregard it entirely.
>
> If, on the other hand, you find that the confession (admission) in evidence was voluntarily made, then you will give it such weight as you feel it deserves under the circumstances.
>
> The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Appellant contends that the instruction given has two fatal shortcomings which the requested instruction would have overcome. The first is that the given instruction fails to define the term "voluntary". The duty to instruct the jury extends to the accurate definition of words and phrases having technical meanings. However, it is unnecessary to define words which are in common use and are readily comprehended by persons of ordinary intelligence. *United States* v. *Maude*, 150 U.S.App.D.C. 378, 391, 481 F.2d 1062, 1075 (1973). The word "voluntary" is such a term, understood in common usage, which accords with the test expressed in *Bram* v. *United States*, supra. There was no error in not defining the term.

The second alleged shortcoming of the instruction given is that the jury was not instructed to apply the "reasonable doubt" standard to its determination of the voluntariness of the confession. This matter was recently addressed by our court in *United States* v. *Curtiss*, 568 F.2d 643 (9th Cir. 1978). We there stated that the enactment of 18 U.S.C. § 3501(a) resolved a previous conflict and requires federal courts to follow the so-called "orthodox" procedure, whereby the trial judge is to determine the voluntariness of a confession outside the presence of the jury; and if the trial judge determines that the statement is voluntary, it is admissible. The jury may then hear the voluntariness evidence and give such weight to the statement as it feels is deserved under all the circumstances. *United States* v. *Curtiss*, 568 F.2d at 647, n.4. The "Massachusetts procedure", which had been followed by some courts, and which required the inclusion of the reasonable doubt standard, is not the standard required by 18 U.S.C. § 3501(a). The jury was therefore adequately and properly instructed on this subject.

The judgment is affirmed.

APPENDIX D

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 77-3808.

UNITED STATES OF AMERICA,
APPELLEE,

v.

RAYMOND EUGENE JOHNSON,
APPELLANT.

Dec. 19, 1978.

Appeal from the United States District Court
for the Central District of California.

Before ANDERSON and HUG, *Circuit Judges*, and EAST*, *District Judge*.

HUG, *Circuit Judge:*

Appellant, Raymond Eugene Johnson, was convicted in a jury trial of aiding and abetting the obstruction of correspondence, a violation of 18 U.S.C. § 1702 and 18 U.S.C. § 2. Johnson appeals on the ground that statements made by him on the day of his arrest should have been suppressed for the reason that the arrest was illegal and the statements were products of the illegal arrest and not voluntarily made, and on the further ground that the judge committed error in instructing the jury concerning the voluntariness of appellant's confession. We affirm.

FACTS

On March 30, 1977, Lena Kearney received by mistake in the mail a letter addressed to Elihu Peterson, containing a

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*Honorable William G. East, United States District Judge for the District of Oregon, sitting by designation.

United States Treasury check payable to Peterson, in the amount of $4,681.00. Kearney discussed the receipt of this check with her sister-in-law, Wynona Powell, and decided to keep the check and attempt to cash it. Powell then phoned a friend, Joe Dodd, to ask him for assistance in cashing the check. On the following day, Dodd arrived at the Kearney residence with Eugene McCardell and Raymond Johnson, the appellant. The three men seated themselves around a coffee table in Kearney's living room and studied the check. Johnson picked up the check and made a telephone call. During this call he discussed the check and the difficulty of cashing the check because of the age of the payee. Johnson then returned after completing the call and stated that he believed he had someone who could assist them in cashing the check. Dodd, Johnson and McCardell then left the Kearney residence and took the check with them.

Special Agent Richard Hemenway of the United States Secret Service commenced investigating this matter. He interrogated Lena Kearney, who told him that appellant Johnson was one of three men who came to her house for the check and participated in a general discussion as to how to cash the check. She further stated that Johnson made a telephone call in an attempt to find someone to forge the check. Kearney also identified Johnson from a photo spread as the person who had come to her house. Wynona Powell gave Agent Hemenway appellant Johnson's telephone number, which she stated had been given to her by Dodd as the number at which Dodd could be contacted. Upon checking with the Los Angeles Police Department, Agent Hemenway discovered that Johnson was named in the criminal history files as an associate of Dodd in Dodd's criminal history. Special Agent Hemenway did obtain a warrant for the arrest of Dodd, based on the above and other information obtained through investigation. A warrant for the arrest of Johnson was not obtained.

Special Agent Hemenway and Special Agent William Pickering went to the Johnson house on May 5, 1977, at approximately 6:00 P.M. The agents watched the house for a short period and Agent Pickering saw Johnson's vehicle,

with two persons inside, pull up to the driveway of Johnson's house. The two agents then approached the doorway, drew their weapons, pointed them downward and knocked, at first identifying themselves by ficticious names. When Johnson opened the door, Hemenway introduced himself and Pickering as special agents and asked to talk with Johnson. Johnson told the agents to come in. Pickering then stood in the living room with Johnson, while Hemenway looked into the other rooms for other people who might be in the house and present a possible danger to the agents. A woman was discovered during the search and was asked to go into the living room. After Hemenway finished looking into the rooms, which took between 15–20 seconds, he told Pickering that everything was secure. Pickering and Hemenway then returned their weapons to their holsters.

Hemenway then asked Johnson if he would step into the bedroom to talk with him and Johnson agreed. Before entering the bedroom, Hemenway informed Johnson of his constitutional rights. Johnson responded and stated that he wished to cooperate and then told Hemenway of his involvement in taking the Treasury check. Johnson was then told that he was under arrest. The agents and Johnson left the residence and went to the police station. At the station, Johnson was again advised of his constitutional rights and stated that he understood them. He told Pickering of his involvement with the check, while Pickering wrote out the statement. Johnson read the statement made changes and initialed them. He was placed under oath by Pickering and signed the statement.

LEGALITY OF THE ARREST AND VOLUNTARINESS OF THE CONFESSION

It was the testimony of the two special agents that they had not intended to effect an arrest at the time they initially entered the residence of appellant Johnson. It was their belief that an arrest had not occurred until after the interview with Johnson. However, whether an arrest has occurred depends upon an objective, not subjective, evaluation of what a person innocent of a crime would have

thought of the situation, given all of the factors involved. Whether an arrest has occurred depends in each case upon an evaluation of all the surrounding circumstances. Primary among these is a determination of whether or not the defendant was free to choose between terminating or continuing the encounter with the law enforcement officers. *Sibron v. New York*, 392 U.S. 40, 67, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968); *United States v. Sanudo-Perez*, 564 F.2d 1288, 1290 (9th Cir. 1977).

From a review of all of the circumstances surrounding the encounter between Johnson and the special agents, we find that appellant's arrest occurred immediately upon the entry of the agents into Johnson's home. They entered the home with drawn guns, which remained drawn until the search of the home had been concluded. Johnson was held in the living room while the house was searched. One of the agents remained with Johnson at all times. It is extremely doubtful that Johnson would have believed that he was free to leave at any time or to request the officers to leave, and it seems that a reasonable person, under those circumstances, would have thought that he was under arrest.

We must therefore consider whether probable cause existed prior to the entry of the special agents into the Johnson residence. The special agents had received information from Lena Kearney and Wynona Powell that Johnson had been present with Dodd and McCardell at the Kearney residence when the check was viewed and the cashing of it through a forged signature was discussed. They also knew that Johnson had placed a telephone call in an attempt to find someone to forge the check. They had already obtained sufficient information to obtain a warrant for the arrest of Dodd; they had information that Johnson was tied in with Dodd, by the fact that Dodd had given Johnson's telephone number as the place where he could be reached, and further that the Los Angeles police files recorded Johnson as having been implicated in some of Dodd's previous criminal history. Johnson had also been identified from a photo spread.

It certainly would have been preferable had the agents obtained a warrant for the arrest of Johnson before ob-

taining entrance to the Johnson residence. However, if probable cause exists for the arrest, appellant's constitutional rights were not violated by the warrantless arrest, even though there may have been time to have obtained a warrant for his arrest. *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976).

Although the district judge indicated at certain portions of the record that he did not believe that probable cause existed for the arrest at the time of the initial entry into the Johnson residence, this was not squarely addressed or analyzed by the judge, for the reason that he found that the arrest did not occur until the agents specifically told Johnson that he was under arrest. It was conceded by the attorney for the appellant at oral argument that this is a matter which, under these circumstances, should be reviewed *de novo* by the appellate court.

The facts and circumstances within the knowledge of the agents, of which they had reasonably trustworthy information, were sufficient to warrant a prudent person in believing that the petitioner had committed a criminal offense, under the standards of *Beck v. Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964). Information which comes from a known perpetrator of a federal crime, such as Kearney and Powell, concerning another who is involved with the perpetrator, is generally entitled to greater weight than mere hearsay information concerning an alleged offense. *Wooten v. United States*, 380 F.2d 230, 232 (5th Cir. 1967). Probable cause existing, the arrest of the appellant upon entry into his residence did not violate his constitutional rights.

Having determined the legality of the arrest and that the defendant was advised of his constitutional rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), we must next consider appellant's argument that the confessions were not voluntary. Appellant contends that the oral and written statements were the result of psychological pressure and confusion generated by the custodial setting, coupled with Johnson's desire to cooperate with the agents so that he would be released on bail.

In addition to meeting the requirements set forth in *Miranda*, supra, statements made by a defendant, in order to be admissible, must also be the product of a free and rational choice, as evidenced by the "totality of the circumstances" surrounding the statements. *Greenwald v. Wisconsin*, 390 U.S. 519, 521, 88 S.Ct. 1152, 20 L.Ed.2d 77 (1968); *Davis v. North Carolina*, 384 U.S. 737, 740, 86 S.Ct. 1761, 16 L.Ed.2d 895 (1966). The test for the voluntariness of a confession was set out by the United States Supreme Court in *Bram v. United States*, 168 U.S. 532, 542–3, 18 S.Ct. 183, 42 L.Ed. 568 (1897) and reiterated in *Hutto v. Ross*, 429 U.S. 28, 30, 97 S.Ct. 202, 203, 50 L.Ed.2d 194 (1976):

> The test is whether the confession was 'extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence'.

There is little in the record to support appellant's contention. Viewing the evidence as a whole in the light most favorable to the government, as required by *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942), we agree with the findings of the trial court that the confessions were voluntarily given

JURY INSTRUCTIONS

The trial court instructed the jury as to its consideration of the confession as follows:

> If it appears from the evidence in the case that a defendant has made a confession or admission you are instructed that you shall give such confession or admission such weight as you feel it warrants under all the circumstances shown by the evidence in the case as to whether it was voluntarily made or involuntarily made. Only if you find that the confession or admission was voluntarily made can you consider it as evidence respecting guilt or innocence of the defendant who has made such confession or admission.

Appellant's requested instruction which the trial court declined to give stated:

> If it appears from the evidence in the case that a confession (admission) would not have been made, but for some threat of harm or some offer or promise of immunity from prosectuion, or leniency in punishment, or other reward, such a confession should not be considered as having been voluntarily made, because of the danger that a person accused might be persuaded by the pressure of hope or fear to confess as facts things which are not true, in an effort to avoid threatened harm or punishment, or to secure a promised reward.
>
> If the evidence in the case leaves the jury with a reasonable doubt as to whether a confession was voluntarily made, then the jury should disregard it entirely.
>
> If, on the other hand, you find that the confession (admission) in evidence was voluntarily made, then you will give it such weight as you feel it deserves under the circumstances.
>
> The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Appellant contends that the instruction given has two fatal shortcomings which the requested instruction would have overcome. The first is that the given instruction fails to define the term "voluntary". The duty to instruct the jury extends to the accurate definition of words and phrases having technical meanings. However, it is unnecessary to define words which are in common use and are readily comprehended by persons of ordinary intelligence. *United States v. Maude*, 156 U.S.App. D.C. 378, 391, 481 F.2d 1062, 1075 (1973). The word "voluntary" is such a term, understood in common usage, which accords with the test expressed in *Bram v. United States*, supra. There was no error in not defining the term.

[12] The second alleged shortcoming of the instruction given is that the jury was not instructed to apply the reasonable doubt standard to its determination of the voluntariness of the confession. This matter was recently addressed by our court in *United States v. Curtiss*, 568 F.2d 643 (9th Cir. 1978). We there stated that the enactment of 18

U.S.C. § 3501(a) resolved a previous conflict and requires federal courts to follow the so-called orthodox procedure whereby the trial judge is to determine the voluntariness of a confession outside the presence of the jury, and if the trial judge determines that the statement is voluntary, it is admissible. The jury may then hear the voluntariness evidence and give such weight to the statement as it feels it deserves under all the circumstances. *United States v. Curtiss*, supra at 647 n.4. The "Massachusetts procedure", which had been followed by some courts and which required the inclusion of the reasonable doubt standard, is not the standard required by 18 U.S.C. § 3501(a). The jury was therefore adequately and properly instructed on this subject.

The judgment is affirmed.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 77-3808

Filed Sept. 2, 1980

UNITED STATES OF AMERICA,
APPELLEE,

v.

RAYMOND EUGENE JOHNSON,
APPELLANT.

Appeal from the United States District Court
for the Central District of California

Before: ANDERSON and HUG, *Circuit Judges, and* EAST*, *District Judge.*

In light of Payton v. New York, 48 U.S.L.W. 4375 (April 15, 1980) we grant appellants' petition for rehearing.

Our prior opinion in this case is withdrawn and a copy of the Opinion, reversing the judgment, is hereto attached.

---

* Honorable William G. East, United States District Judge for the District of Oregon, sitting by designation.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 77-3808

Filed Dec. 29, 1980

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

RAYMOND EUGENE JOHNSON,
DEFENDANT-APPELLANT.

ORDER

Before: ANDERSON and HUG, *Circuit Judges*, and EAST*, *District Judge*

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Anderson and Hug have voted to reject the suggestion for a rehearing en banc and Judge East recommends rejection of the suggestion.

The Amended Opinion heretofore filed in this case has been revised in accordance with the Order filed herewith.

The full court has been advised of the en banc suggestion and revisions to the Amended Opinion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

---

*The Honorable William G. East, United States District Judge for the District of Oregon, sitting by designation.

Office-Supreme Court, U.S.
FILED
MAY 11 1981
ALEXANDER L. STEVAS
CLERK

No. 80-1608

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

RAYMOND EUGENE JOHNSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Almeida-Sanchez v. *United States*, 413 U.S. 266 3

Arkansas v. *Sanders*, 442 U.S. 753 4

Bowen v. *United States*, 422 U.S. 916 3

Brown v. *Florida*, 446 U.S. 902, on remand, 392 So.2d 280, petition for cert. pending, No. 80-1644 (filed Mar. 27, 1981) 1, 2

Bush v. *Florida*, 446 U.S. 902, on remand *sub nom. Busch* v. *State*, 392 So.2d 272 .... 2, 3

Dunaway v. *New York*, 442 U.S. 200 4

Linkletter v. *Walker*, 381 U.S. 618 3

Payton v. *New York*, 445 U.S. 573 ..... 1, 2, 3

Steagald v. *United States*, No. 79-6777 (Apr. 21, 1981) 1, 2

United States v. *Dien*, 609 F. 2d 1038, adhered to on petition for rehearing, 615 F. 2d 10 4

United States v. *Medina-Verdugo*, 637 F. 2d 649 4

United States v. *Peltier*, 422 U.S. 531 3

United States v. *Ross*, No. 79-1624 (D.C. Cir. Mar. 31, 1981) 4

United States v. *Tucker*, 610 F. 2d 1007 3-4

Page

Constitution:

United States Constitution, Fourth Amendment 1, 2, 3, 4

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1608

UNITED STATES OF AMERICA, PETITIONER

v.

RAYMOND EUGENE JOHNSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

The question presented in this case is whether the principles announced in *Payton* v. *New York*, 445 U.S. 573 (1980), should be applied retroactively to exclude evidence obtained in the course of warrantless arrest entries that took place prior to the decision in *Payton*.[1] In our petition for certiorari, we noted that the issue of the retroactivity of *Payton* was then under submission in *Steagald* v. *United States*, No. 79-6777 (Apr. 21, 1981), and we suggested that the Court defer consideration of our petition in this case pending its decision in *Steagald*.

Without reaching the *Payton* retroactivity question, the Court in *Steagald* held that, absent exigent circumstances or consent, the Fourth Amendment requires a law enforcement officer to obtain a search warrant before searching for

---

[1]This question is also raised in the petition for a writ of certiorari in *Florida* v. *Brown*, No. 80-1644 (filed Mar. 27, 1981).

the subject of an arrest warrant in the home of a third party. It is our submission that the Court should now grant our petition in this case in order to resolve the retroactivity question that it did not reach in *Steagald*.

Neither the result in *Steagald* nor the fact that the Court did not decide the *Payton* retroactivity issue in that case suggests that *Payton* should be applied retroactively. The substantive Fourth Amendment question presented in *Steagald* was quite different from the question that was before the Court in *Payton*. Thus, as we conceded in our brief in *Steagald* (79-6777 U.S. Br. 12, 26), it is conceivable that even if the Court in *Payton* had not adopted an arrest warrant requirement for entries into a suspect's own house, it would still have required the police to secure search warrants before searching for a suspect in a third party's residence. Accordingly, the Court's holding in *Steagald*, and its silence with respect to the question of *Payton*'s retroactivity, should not be construed as an implicit acceptance of the proposition that the principles announced in *Payton* should be applied retroactively.

Nor is it of any significance with respect to the retroactivity issue that, following the decision in *Payton*, the Court vacated the judgments in a number of cases and remanded those cases to the lower courts for further consideration in light of *Payton*. See, *e.g.*, *Brown* v. *Florida*, 446 U.S. 902, on remand, 392 So.2d 280 (Fla. Dist. Ct. App. 1980), petition for cert. pending, No. 80-1644 (filed Mar. 27, 1981); *Bush* v. *Florida*, 446 U.S. 902, on remand *sub nom. Busch* v. *State*, 392 So.2d 272 (Fla. Dist. Ct. App. 1980). After this Court's remands in *Brown* and *Bush*, the Florida District Court of Appeal held that *Payton* should be given retroactive application. *Brown, supra*, 392 So.2d at 284; *Busch, supra*, 392 So.2d at 274. In the latter case, the Florida court concluded that this Court would not have vacated the judgment and remanded the case for further consideration

in light of *Payton* "if there had been no intention on the part of the Supreme Court that *Payton* be applied to this case, which was not final and was pending in the Supreme Court at the time its opinion in *Payton* was rendered." 392 So.2d at 274. In reaching this conclusion the court relied upon this Court's statement in *Linkletter* v. *Walker*, 381 U.S. 618, 627 (1965), "that a change in law will be given effect while a case is on direct review."

In essence, the Florida court gave to this Court's summary vacation and remand order, which says nothing at all about the subject of *Payton*'s retroactivity, the same effect as would be given to an explicit decision on the merits after briefing of the issue. We cannot agree that such a conclusion is proper. Indeed, the reasoning of the Florida court in *Busch* is directly contrary to *Bowen* v. *United States*, 422 U.S. 916 (1975), where this Court refused to give retroactive effect to its decision in *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), notwithstanding the fact that it previously had vacated the judgment in Bowen's case and remanded for reconsideration in light of *Almeida-Sanchez*. Relying on its decision in *United States* v. *Peltier*, 422 U.S. 531 (1975), which refused to apply *Almeida-Sanchez* retroactively even though Peltier's direct appeal was pending on the date of the decision in *Almeida-Sanchez*, this Court concluded that the reasons that dictated a holding of nonretroactivity in *Peltier* compelled a similar result in *Bowen*. 422 U.S. at 918. Here, too, the fact that respondent's case was pending on direct appeal on the date that *Payton* was decided does not entitle respondent to benefit from Payton if that decision is not otherwise to be applied retroactively.

Although this Court has never held any of its Fourth Amendment decisions to apply retroactively for exclusionary rule purposes to searches or seizures undertaken prior to the date of the decision, the courts of appeals have, with increasing frequency of late, been holding such decisions

fully retroactive. See, *e.g.*, *United States* v. *Tucker*, 610 F. 2d 1007 (2d Cir. 1979) (*Dunaway* v. *New York*, 442 U.S. 200 (1979), retroactive); *United States* v. *Ross*, No. 79-1624 (D.C. Cir. Mar. 31, 1981) (en banc), slip op. 6-9 (*Arkansas* v. *Sanders*, 442 U.S. 753 (1979), retroactive); *United States* v. *Medina-Verdugo*, 637 F. 2d 649, 652 (9th Cir. 1980) (same); *United States* v. *Dien*, 609 F. 2d 1038, 1046 (2d Cir. 1979), adhered to on petition for rehearing, 615 F. 2d 10 (1980) (same). The issue of the retroactivity of any particular Fourth Amendment decision often appears to be of diminishing practical importance by the time it reaches this Court. But because of the growing divergence between the approach of this Court in its retroactivity decisions and the approach of many state and lower federal courts, more is at stake here than just the retroactivity of the ruling on the arrest-entry issue. It is our view that it is time for this Court to address itself again to the retroactivity issue, and we submit that this case affords a suitable occasion to clarify the law in this area.

For the reasons stated in the petition and in this supplemental memorandum, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MAY 1981

DOJ-1981-05

Office - Supreme Court, U.S.
FILED
NOV 19 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1606

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA,

Petitioner

v.

RAYMOND EUGENE JOHNSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

PETITION FILED: MARCH 23, 1981
PETITION GRANTED: OCTOBER 5, 1981

TABLE OF CONTENTS

	Page
District court docket entries	1
Indictment	5
Oral ruling of district court on motion to suppress evidence	7
Order of court of appeals deferring decision on respondent's petition for rehearing and rehearing en banc	8
Order granting certiorari	9

DISTRICT COURT DOCKET ENTRIES

DATE	PROCEEDINGS

5-6-77 Deft arrn & comm to cust of USM. Jo Ann Curtis, Pnl Atty apptd as cnsl only until indictment. Bail set at $2,500 P/R w/PSA supv & posted this date. P/I set for 5-31-77 at 8:30 a.m. kc

5/23/77 Fld indct Bond set at $2,500 P/R USA to issu note (MML Crim Cal Judge) jk
Fld CR72 fr AUSA Bonner DOB: 7/20/46 jk
Fld bond posted 5/6/77 ($2,500P/R) Fld notc of flg bond

5-6-77 Deft arr & comm to cust of U.S. Marshal. V. Sloan, DFPD appt. Bail set at 5,000 P/R bond w/PSA supv & drug program. P/I date set for 5-31-77 at 8:30 am. Bond posted. rs for kc

5-10-77 Panel atty Elliott Aheroni apptd cnsl this dt, due to poss conflict of interest in public defender's office. jn

5/23/77 Fld indct Bond set at $5,000P/R USA to issu summs (MML Crim Cal Judge) jk
Fld CR72 fr AUSA Bonner DOB:7/21/46 jk
Fld bond posted 5/6/77 Fld notc of flg bond jk

5/31/77 ARR MIN: Court appts atty Carl Stewart deft Dodd cnsl Court appts atty John Walter deft Johnson cnsl Court ord case assnd Judge Whelan & cont 1:15PM for fur procs
MIN ORD: Both defts arr & plea NG Trizl 7/19/77, 10AM Ord AUSA be assnd this case forthwith (FW) jk

6/15/77 Fld deft Dodd notc of mot & mot to suppr confessn retnbl 7/18/77, 2PM; P/A; declar jk

6/21/77 Fld USA resp to deft mot to suppr confessn of deft; affids jk

6/28/77 Fld deft Johnson note of mot & mot to suppr confessn retnbl 7/18/77, 2PM; declar; P/A jk

7/12/77 Fld USA resp to deft mot to suppr confession; P/A; affids jk

DATE	PROCEEDINGS

7/14/77 Fld applic & ORD (FW) for writ of H/C ad proseq retnbl 7/18/77, 2PM for hrg Deft in Hall of Justice, LA jk

7/15/77 Fld govt's trial Memo. mk

7/15/77 Fld govt's proposed Jury Insts. mk

7/18/77 Fld applic & ORD (FW) for writ of H/C ad testif retnbl 7/19/77, 10AM bef FW for testmy as to witn Eugene McCardell Witn in LACJ jk
MIN ORD: Defts mots to suppr hrd Cont 7/19/77, 9:30AM for J/T & fur hrg on mot to suppr. (FW) jk

7/19/77 MIN ORD: Fur hrg on both defts mots to suppr. Mots to suppr are both denyd. Court ord case severed as to ea deft Cont 7/20/77, 10AM for J/T (FW) jk

7/20/77 MIN ORD: Ord re severance of trial is vacated. Fld USA suppl trial memo 1st DAY J/T: Sw wits Mkd exbts Cont 7/21/77, 9:30AM (FW) jk

7/21/77 MIN ORD: 2nd DAY J/T: Deft Johnson mot to suppr confessn is dnyd. Cont 7/22/77 for fur trial both defts (FW) jk

7/22/77 MIN ORD: 3rd Day J/T: Sw wits Cont 7/25/77, 10:30AM (FW) jk

7/25/77 Fld deft Johnson proposed jury instructions jk
MIN ORD: 4th Day J/T: Sw wits Mkd exbts Cont 7/26/77 for fur trial (FW) jk

7/26/77 MIN ORD: 5th Day J/T: Cont 2/27/77 for fur trial (FW) ,

7/27/77 MIN ORD: 6th Day J/T: Jury retns w/verdict of GUILTY as to deft Dodd on both cts & GUILTY as to deft Johnson on ct 1 & NOT GUILTY ct 2. Ref. to P/O for I & R & cont 8/27/77, 2PM for sentcg both defts (FW) jk

8/22/77 Fld NOT OF APPEAL as to deft Johnson fr jdgmnt ent 8/22/77. No flg fee pd. jw

DATE	PROCEEDINGS

8/22/77 MIN ORD: Sent cont 8/29/77, 2PM as to deft Dodd. SENT: Deft Johnson: ISS, 5yrs prob, usual conds. Deft advised of right to appeal. Fld jdgmnt & issd cys. Bond exon. (FW)
ENT: 8/24/77. Sent to Ct. 1. Made JS-3 jw

8/29/77 MIN ORD: SENT:

DOCKET ENTRY: SENT DEFT DODD: I.S.S. on each of Cts 1 & 2 & deft is plcd on probn for a period of 5 yrs, usual conds, each of Cts 1 & 2 to begin & run conc with each other, & fur conds that deft not use narcotics of any kind; and as an expressed condition of probn he shall voluntarily submit himself to Central Bricks, located at 1925 Trinity, L.A., CA; that he permit himself to be voluntarily confined within such institution on an incarcerated basis for a period of 5 months, and thereafter for a period of an additional 7 months; and that he voluntarily commit himself to be confined on a basis whereby he must return each night to an institution; but that he will be permitted to work during the daytime; that he maintain goodstanding in such program for narcotic addition therapy during all of such period of time, to wit: 5 months, plus 7 months; and that he submit himself voluntarily for testing at such time as referred by such program; and that he authorize such program to communicate to the U.S. P/O all results of any of his experiences while under such treatment at such program including the results of any tests for urinalysis that he undergoes there at such program. IN the event that for any reason such Central Bricks program be not approved by the P/O in the future as a place for treatment of narcotic addicts then the terms and conds of prob will be altered to require his voluntary submission to some such similar program. In the event he does not so submit himself for such voluntary treatment then it will be deemed that he has violated probn. Crt fur ord that after deft leaves such institution he shall not assoc with any person or persons known by him or suspected by him to be a user of, seller of, distributor of, or possessor of any nar-

DATE	PROCEEDINGS

cotic drugs, marijuana, or any dangerous drug which has been obtained without a bonafide prescription issd by a practitioner in the course of his professional practice. Fur ord that after deft has completed such treatment under Central Bricks program, and if the P/O deems it necessary that he submit himself to such additional outpatient program as may be justified for treatment of narcotic addiction. Ord deft submit himself to Central Bricks on 8/30/77, 9AM & upon surrender to Central Bricks deft's bond will be exon. Deft advised of right to appeal. Fld Jdgmnt & Issd cpys. ENT 9-1-77 MD JS-3 as to deft DODD only. Made JS-3 (FW) le

9/8/77 Fld deft Raymond E. Johnson's NOTC OF APPEAL frm jdmt ent 8/22/77 w/certif of atty, designatn of appeal & reptr's transcrpts of procdgs, & ORD (FW) DENYING Appeal in F/P. le

9/27/77 Fld deft Dodd's NOT OF APPEAL & ORD in F/P frm jdmt ent on 8/29/77 w/atty cert, designatn of record reprtr's transcrpts & ORD DENYING appeal in F/P. (FW) le

10/5/77 Fld reprtr's extimat of cost of transcrpt on Appeal & deposit req. le

2-1-78 Fld Not to App. bf Mag VST retnbl 2-8-78, 9:30 AM briefing sched. deft Johnson. Issd. kls

2-8-78 Fld orig & 2 cpy of reptr's trancs of proc had on 5-31-77, 7-18-77, 7-19-77 (vol. 1), 7-20-77 (vol. 2), 7-21-77 (vol. 3), 7-22-77 (vol. 4), 7-25-77 (vol. 5), 7-26-77, 7-27-77, 8-22-77, 8-29-77 (vol. 6)

3-3-78 Issd & fwd to C/A ICC & 2 printed cpys of clk's rec on appeal. Along w/ 1 orig & 2 cpys of reptr's transc of prcdgs had on 5-31-77, 7-18-77, 7-19-77 (vol. 1), (vol. 2, 7-21-77 (vol. 3), 7-22-77 (vol. 4), 7-25-77 (vol. 5), 7-26-77, 7-27-77, 8-22-77, 8-29-77 (vol. 6).

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

March 1977 Grand Jury

CR 77-666

UNITED STATES OF AMERICA, PLAINTIFF

v.

OSCAR JOSEPH DODD,
RAYMOND EUGENE JOHNSON, DEFENDANTS

(18 U.S.C. § 1702; § 2; § 641; Obstruction of Correspondence; Aiding and Abetting; Receiving Stolen Government Property)

[Filed May 23, 1977]

INDICTMENT

The Grand Jury Charges:

COUNT ONE

(18 U.S.C. § 1702)

On or about March 31, 1977, in Los Angeles County, within the Central District of California, Lena Kearney and Wynona Wilkins, also known as Wynona Marie Powell, took a United States Treasury Check Number 24,156,256, Symbol 3052, dated March 24, 1977, in the amount of $4,681.00 addressed to Elihu Peterson, 1136 W. 106th St., Los Angeles, California which had been in a post office and an authorized depository for mail matter and in the custody of a letter and mail carrier, before it had been delivered to the person to whom it was directed, with design to obstruct the correspondence of such addressee.

MHB:ms

At said time and place, defendants OSCAR JOSEPH DODD, and RAYMOND EUGENE JOHNSON aided, abetted, counseled, induced and procured the commission of the offense alleged above.

COUNT TWO

(18 U.S.C. § 641)

On or about March 31, 1977, in Los Angeles County, within the Central District of California, defendants OSCAR JOSEPH DODD and RAYMOND EUGENE JOHNSON knowingly and willfully received, concealed and retained stolen property of the United States, that is, a United States Treasury Check Number 24,156,256, Symbol 3052, dated March 24, 1977, in the amount of $4,681.00, a value in excess of $100.00 with intent to convert the property to his own use, the defendant then knowing said property to have been stolen.

A TRUE BILL
/s/ George E. Broadbent, Jr.
Foreman

/s/ William D. Keller
WILLIAM D. KELLER
United States Attorney

ORAL RULING OF DISTRICT COURT ON MOTION TO SUPPRESS EVIDENCE

[472]

* * * * *

THE COURT: All right. The Court finds that the—I have already made findings and I find that the information [473] which was available to the Secret Service prior to the going of Mr. Hemenway and Mr. Pickering to the Johnson home on May 5th of this year—wasn't it?

THE WITNESS: Yes, sir.

THE COURT: —May 5th, 1977, may or may not not have been sufficient probable cause for the arrest. The Court finds that—no. I would say this, I do not consider that there was probable cause to make an arrest at that point because of the fact that while it is true that the defendant Johnson was shown at the scene of the crime, that it was the proper thing for the secret service agents to develop whether or not there was probable cause for his arrest and that was not developed until after the interview.

The Court finds again and reaffirms its finding that when the arrest was actually made that the defendant Johnson had already supplied the—through his voluntary, free and voluntary statements made with full knowledge of the nature, significance and consequences thereof, and after he had been fully advised of each and every right, constitutional right which is referred to in the decision of Miranda versus Arizona had been given to him, and that the arrest did not occur until after he had through his own voluntary admissions and confession established probable cause for his arrest, and that the arrest therefore was a legal arrest. The evidence is [474] admissible.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-3808

UNITED STATES OF AMERICA, APPELLEE
v.
RAYMOND EUGENE JOHNSON, APPELLANT

[Filed Mar. 5, 1979]

Appeal from the United States District Court
For the Central District of California

Before: ANDERSON and HUG, Circuit Judges, and EAST *, District Judge

ORDER

A decision on appellant's petition for rehearing and for rehearing en banc is deferred pending a decision of the United States Supreme Court in *Payton v. New York*, No. 78-5426. Written objections to this deferral may be filed by either party within ten (10) days of the date of the filing of this order.

SUPREME COURT OF THE UNITED STATES

No. 80-1608

UNITED STATES, PETITIONER

v.

RAYMOND EUGENE JOHNSON

ORDER ALLOWING CERTIORARI

Filed October 5, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 357811 670

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JUN 15 1981
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1608

UNITED STATES OF AMERICA, Petitioner

vs.

RAYMOND EUGENE JOHNSON, Respondent

MOTION FOR LEAVE TO

PROCEED

IN FORMA PAUPERIS

JOHN F. WALTER
WALTER, FINESTONE & RICHTER
10850 Wilshire Boulevard
Suite 1075
Los Angeles, California 90024
(213) 475-9755

Attorneys for Respondent

Dated: June 12, 1981

WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10850 WILSHIRE BOULEVARD
SUITE 1075 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 475-9755

WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 478-0788

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1608

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vs.

RAYMOND EUGENE JOHNSON, Respondent

MOTION FOR LEAVE TO

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Respondent, Raymond Eugene Johnson, pursuant to U.S. Sup. Ct. Rule 46 and 18 U.S.C. § 3006A(d)(6), requests leave to file the attached Brief In Opposition To Petition For A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without pre-payment of costs, and to proceed in forma pauperis. Respondent was represented by appointed counsel pursuant to the Criminal Justice Act of 1964, as amended, in the United States District Court for the central district of Cali-

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fornia and on appeal to the United States Court of Appeals for the Ninth Circuit.

DATED: June 12, 1981.

Respectfully submitted,

JOHN F. WALTER
WALTER, FINESTONE & RICHTER

By _____
John F. Walter
Attorneys for Petitioner

10850 Wilshire Boulevard
Suite 1075
Los Angeles, California 90024

(213) 475-9755

WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10850 WILSHIRE BOULEVARD
SUITE 1075 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 475-9755

Office-Supreme Court, U.S.
FILED
JUN 15 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

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OCTOBER TERM, 1980

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UNITED STATES OF AMERICA, Petitioner

vs.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN F. WALTER
WALTER, FINESTONE & RICHTER
10850 Wilshire Boulevard
Suite 1075
Los Angeles, California 90024
(213) 475-9755

Attorneys for Respondent

Dated: June 12, 1981

WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10850 WILSHIRE BOULEVARD
SUITE 1075 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 475-9755

WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 478-9760

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITES	ii
INTRODUCTION	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
A. There is no Conflict Between This Court's and Lower Courts' Analysis of the Retroactive Application of Fourth Amendment Principles	2
B. The Court of Appeals' Decision Followed Settled Principles Established by This Court and the Ninth Circuit Court of Appeals	4
C. A Change in the Law will be Given Effect to a Case Pending on Direct Review	8
CONCLUSION	10

WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 478-0788

TABLE OF AUTHORITIES

CASES

	Page
Almeida-Sanchez v. United States 413 U.S. 266 (1973)	8
Arkansas v. Sanders 442 U.S. 753 (1979)	3
Bowen v. United States 422 U.S. 916 (1975)	8, 9
Bradley v. Richmond School Board 416 U.S. 696 (1974)	8
Brown v. Florida 446 U.S. 902, on remand 392 So.2d 280 (Fla. Dist. Ct. App. 1980), petition for cert. pending (No. 80-1644, filed March 27, 1981))	9
Bush v. Florida 446 U.S. 902, on remand sub nom. Busch v. Florida 392 So.2d 272 (Fla. Dist. Ct. App. 1980)	9
Coolidge v. New Hampshire 403 U.S. 443 (1971)	7
Dorman v. United States 435 F.2d 385 (D.C. Cir. 1970)	5, 6
Gerstein v. Pugh 420 U.S. 103 (1975)	7
Johnson v. United States 333 U.S. 10 (1948)	7
Jones v. United States 357 U.S. 493 (1958)	7
Linkletter v. Walker 381 U.S. 618 (1965)	5, 8, 9
Mapp v. Ohio 367 U.S. 643 (1961)	9
Payton v. New York 445 U.S. 573 (1980)	1, 2, 4, 6, 8, 9, 10
Steagald v. United States No. 79-6777 (April 21, 1981)	9
Stovall v. Denno 388 U.S. 293 (1967)	3, 4, 10

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WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 478-0788

CASES

	Page
Thorpe v. Durham Housing Authority 393 U.S. 268 (1969)	8
United States v. Blake 632 F.2d 731 (9th Cir. 1980)	3, 4, 6, 9
United States v. Bradley 455 F.2d 1181 (1st Cir. 1972)	6
United States v. Bustamante-Gamez 488 F.2d 4 (9th Cir. 1973), cert. denied 416 U.S. 970 (1974)	6
United States v. Calhoun 542 F.2d 1094 (9th Cir. 1976)	5, 6
United States v. Davis 461 F.2d 1026 (3d Cir. 1972)	6
United States v. Dien 609 F.2d 1038 (2d Cir. 1979) on petition for rehearing, 615 F.2d 10 (1980)	3
United States v. Flickinger 573 F.2d 1349 (9th Cir.), cert. denied 439 U.S. 836 (1978)	6
United States v. Gray 626 F.2d 102 (9th Cir. 1980)	9
United States v. Houle 603 F.2d 1297 (8th Cir. 1979)	6
United States v. Killebrew 560 F.2d 729 (6th Cir. 1977)	6
United States v. Madena-Verdugo 637 F.2d 649 (9th Cir. 1980)	3
United States v. Martinez-Fuerte 420 U.S. 542 (1976)	7
United States v. McLaughlin 525 F.2d 517 (9th Cir. 1975), cert. denied 427 U.S. 904 (1976)	6
United States v. Peltier 422 U.S. 531 (1975)	3, 5, 8, 9
United States v. Phillips 497 F.2d 1131 (9th Cir. 1974)	5, 6
United States v. Prescott 581 F.2d 1343 (9th Cir. 1978)	1, 2, 3, 4, 5, 6, 8

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WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - ANO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 478-0788

CASES

	Page
United States v. Reed, 572 F.2d 412 (2d Cir. 1978), cert. denied sub nom. Goldsmith v. United States, 439 U.S. 913	6
United States v. Ross, 79-1624 (D.C. Cir. 1981)	3
United States v. Santana, 427 U.S. 38 (1976)	7
United States v. Shye, 492 F.2d 886 (6th Cir. 1974)	6
United States v. Stubblefield, 621 F.2d 980 (9th Cir. 1980)	9
United States v. Tucker, 610 F.2d 1007 (2d Cir. 1979)	3
United States v. United States District Court, 407 U.S. 297 (1972)	7
United States v. Velasquez, 626 F.2d 314 (3d Cir. 1980)	9
United States v. Watson, 423 U.S. 411 (1976)	7
Wallace v. King, 626 F.2d 1157 (4th Cir. 1980)	9
Wanger v. Bonner, 621 F.2d 675 (5th Cir. 1980)	9

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WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 479-0788

INTRODUCTION

Respondent accepts petitioner's Identification of Question Presented For Review and presentation of the Statement of the Case.

SUMMARY OF ARGUMENT

The issue before the Court is whether the exclusionary rule requiring the suppression of evidence obtained following a non-consensual warrantless entry into respondent's house to arrest him should be applied where the entry occurred prior to this Court's decision in Payton v. New York, 445 U.S. 573 (1980), and the Ninth Circuit's decision in United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978).

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WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 478-9788

The absence of any conflict between this Court's and lower courts' analysis of the retroactivity of constitutional questions renders petitioner's request for this Court to review the issue without merit. Moreover, the Ninth Circuit Court of Appeals did not err in applying the principles of Payton and Prescott retroactively to this case. Finally, the issue of retroactivity of Payton or Prescott is not appropriately before the Court inasmuch as this case was pending on direct review at the time of the Payton and Prescott decisions. Accordingly, the petition for certiorari should be denied.

ARGUMENT

A. THERE IS NO CONFLICT BETWEEN THIS COURT'S AND LOWER COURTS' ANALYSIS OF THE RETROACTIVE APPLICATION OF FOURTH AMENDMENT PRINCIPLES

Petitioner couches the importance of the Court's review of this case in terms of the Court's interest "to ensure that the courts of appeal employ a sound analytical approach in deciding basic Fourth Amendment questions, including the retroactivity issue presented here." Petition, page 11. In its Supplemental Memorandum, petitioner cites the "growing divergence" between the approach of this Court and the approach of state and lower federal courts in retroactivity decisions as cause for review of this case. In fact, there is no divergence between the approach of the Court and the approach of state and lower federal courts on the issue of retroactivity of Fourth Amendment decisions, and, therefore, certiorari should not be granted.

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WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 478-0788

The criteria considered in determining the retroactivity of new constitutional principles are well-established: (a) the purpose to be served by the new standards; (b) the extent of reliance by law enforcement authorities on the old standards; and (c) the effect on the administration of justice of a retroactive application of the new standards. Stovall v. Denno, 388 U.S. 293, 297 (1967); United States v. Peltier, 422 U.S. 531, 534 (1975). If these criteria have been utilized by lower courts in analyzing the retroactivity of new constitutional protections, the lower courts are complying with this Court's mandate and there is no conflict.

In each case cited by petitioner to support the purported growing divergence, the court has in fact based its decision on the criteria set forth in Stovall v. Denno, 388 U.S. 293 (1967) and United States v. Peltier, 422 U.S. 531 (1975), and in each case, as in the instant case, the particular facts of the case accounted for the differing opinions.

For example, in United States v. Dien, 609 F.2d 1038 (2d Cir. 1979) on petition for rehearing, 615 F.2d 10 (1980), the court analyzed the retroactivity of Arkansas v. Sanders, 442 U.S. 753 (1979) pursuant to the standards set forth in United States v. Peltier. 609 F.2d at 1046. Similarly, in United States v. Tucker, 610 F.2d 1007 (2d Cir. 1979), the court applied the three-fold standard in Fourth Amendment exclusionary rule cases as elaborated in United States v. Peltier. 610 F.2d at 1010. Accord, United States v. Madena-Verdugo, 637 F.2d 649, 652 (9th Cir. 1980) and United States v. Ross, 79-1624 (D.C. Cir. 1981) (en banc). As discussed, infra, United States v. Blake, 632 F.2d 731 (9th Cir. 1980) which held that Prescott should be applied retroactively, utilized the Stovall v. Denno approach in deciding the issue. 632 F.2d at 735-736.

WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AMS CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 478-9748

The fact that the circuits are consistently holding constitutional principles retroactive does not compel the grant of certiorari herein. The important fact is that in each case the issue was fully analyzed pursuant to the standards of this Court, and, based upon the application of the particular facts to the standards, the principle was held to be retroactive. Contrary to petitioner's argument, the decisions of the circuit courts do not demonstrate a growing divergence in retroactivity decisions but in fact readily establish the lack of necessity for the Court's review of the issue. So long as the lower courts continue to comply with the criteria of the Court in determining retroactivity issues, there is absolutely no basis for the grant of certiorari.

B. THE COURT OF APPEALS' DECISION FOLLOWED SETTLED PRINCIPLES ESTABLISHED BY THIS COURT AND THE NINTH CIRCUIT COURT OF APPEALS

An even more compelling reason for the Court to deny certiorari is that the opinion in this case, relying upon principles common to Prescott and Payton, is in accordance with settled principles and is not erroneous.

Respondent's arrest occurred in May 1977, admittedly prior to this Court's and the Ninth Circuit's recent decisions imposing the warrant requirement on arrests in private premises. However, prior to the filing of the Order revising the Amended Opinion, the Ninth Circuit decided United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978) and expressly held that Prescott should be retroactively applied in United States v. Blake, 632 F.2d 731 (9th Cir. 1980). The Blake decision was premised on an analysis of the criteria for retrospective application of Prescott as set forth in Stovall v. Denno, 388

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U.S. 293 (1967) and the specific application to cases involving exclusionary rules as set forth in Linkletter v. Walker, 381 U.S. 618, 636-637 (1965) and United States v. Peltier, 422 U.S. 531, 535 (1975). Concluding that Prescott should be applied retroactively, the court opined that Prescott did not constitute a sharp break in the law; rather, the result was clearly foreshadowed. The fact that the Ninth Circuit did not have occasion to directly resolve the issue until Prescott should not result in the court's refusal to apply Prescott retroactively.

The prior decisions relied on by the Prescott court clearly support the conclusion that the extended constitutional protection should be given retroactive effect. In United States v. Calhoun, 542 F.2d 1094 (9th Cir. 1976), involving a 1974 arrest, the government conceded that "absent exigent circumstances, the entry [into defendant's apartment] would be illegal." 542 F.2d at 1102. The court then found that there were no exigent circumstances and thus the evidence seized pursuant to the arrest should have been suppressed. 542 F.2d at 1102-1103. Clearly, the government's concession that an arrest warrant was required before the law enforcement officers could enter the apartment signaled a clear awareness of the impending constitutional requirement of an arrest warrant prior to entry into a private dwelling.

Similarly, in United States v. Phillips, 497 F.2d 1131 (9th Cir. 1974), the court considered the warrant requirement where officers entered a private dwelling (commercial building) to effect an arrest. The court analyzed whether the warrantless entry was justified using the criteria established in Dorman v. United States, 435 F.2d 385, 390 (D.C. Cir.

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WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 475-9755

1979).[1] However, in Phillips, supra, it was unnecessary for the court to decide the arrest warrant issue because the court concluded that the arrest was illegal on the grounds that the agents lacked probable cause to believe that the defendant was in the building. 497 F.2d at 1135-1136.

Prescott and Blake correctly state that Ninth Circuit decisions prior to Prescott clearly and unmistakenly warned law enforcement officers that warrantless arrests in a private dwelling were suspect. Even prior to Prescott, exigent circumstances constituted the only basis that could justify a warrantless arrest inside a home. See United States v. Bustamante-Gamez, 488 F.2d 4, 8 (9th Cir. 1973), cert. denied 416 U.S. 970 (1974); United States v. McLaughlin, 525 F.2d 517, 520 (9th Cir. 1975), cert. denied 427 U.S. 904 (1976); United States v. Flickinger, 573 F.2d 1349, 1354 (9th Cir.), cert. denied 439 U.S. 836 (1978). If such was not the case, the government certainly would not have conceded that the warrantless entry to arrest would be illegal absent exigent circumstances in Calhoun.

It is thus clear that the Ninth Circuit's opinion, relying on Prescott, was correctly decided upon settled principles, and thus further review is not warranted.

Just as the Ninth Circuit correctly applied Prescott to the subject warrantless arrest entry, its retroactive application of Payton was correct. Prior to Payton, the Court had

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1/ Dorman v. United States was the first of a series of court of appeals cases holding that warrantless arrest entries into the home are unconstitutional. See United States v. Reed, 572 F.2d 412 (2d Cir. 1978), cert. denied sub nom. Goldsmith v. United States, 439 U.S. 913; United States v. Killebrew, 560 F.2d 729 (6th Cir. 1977); United States v. Shye, 492 F.2d 886 (6th Cir. 1974); United States v. Houle, 603 F.2d 1297 (8th Cir. 1979); See also United States v. Bradley, 455 F.2d 1181 (1st Cir. 1972) and United States v. Davis, 461 F.2d 1026 (3d Cir. 1972) (assuming without decision the unconstitutionality of warrantless home arrests).

WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 479-0788

expressly reserved the issue of the unconstitutionality of a warrantless entry into a home to effect an arrest on a number of occasions. See United States v. Santana, 427 U.S. 38 (1976); id at 45 (Marshall, J., dissenting); United States v. Watson, 423 U.S. 411, 418, n. 6 (1976); Gerstein v. Pugh, 420 U.S. 103, 113, n. 13 (1975); Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971); Jones v. United States, 357 U.S. 493, 499-500 (1958).2/

Indeed, the Court had sanctioned warrantless arrests only in public places, United States v. Watson, 423 U.S. 411 (1976); United States v. Santana, 427 U.S. 38 (1976), and repeatedly emphasized the special sanctity afforded the home. United States v. United States District Court, 407 U.S. 297 (1972), United States v. Martinez-Fuerte, 420 U.S. 542 (1976); Johnson v. United States, 333 U.S. 10 (1948). Surely, the Court's reservation of this issue could not have conceivably granted law enforcement officers carte blanche to make warrantless home arrests in view of the careful analysis of the boundary of public versus private portions of a dwelling in Watson and Santana. Thus, any reliance by law enforcement officers on Watson or Santana on the issue of a warrantless arrest entry into a home was totally unjustified.

2/ In Coolidge, the Court stated in dicta that:

> "The notion that the warrantless entry of a man's house in order to arrest him on probable cause is per se legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are per se unreasonable in the absence of some one of a number of well-defined 'exigent circumstances.'"
> 403 U.S. 477-78.

WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 478-0788

Contrary to petitioner's argument,[3/] Payton did not mark a sharp break in prior decisions regarding warrantless arrest entries into a home. Although the law was unsettled on this issue, the Court's prior decisions certainly foreshadowed the Payton ruling.

C. A CHANGE IN THE LAW WILL BE GIVEN EFFECT TO A CASE PENDING ON DIRECT REVIEW

It is well settled that a change in the law will be given retroactive effect to a case pending on direct review at the time of the decision. Linkletter v. Walker, 381 U.S. 618, 627 (1965). The principle applies whether or not the new law is expressly made applicable to pending cases. See Thorpe v. Durham Housing Authority, 393 U.S. 268, 281-82 (1969); Bradley v. Richmond School Board, 416 U.S. 696, 711-16 (1974). This principle is unquestionably applicable to the instant case which was pending on direct review at the time of the Payton and Prescott decisions.

Petitioner attempts to undermine the import of Linkletter and its progeny by relying on the decisions in Bowen v. United States, 422 U.S. 916 (1975) and United States v. Peltier, supra, both of which held that Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (prohibiting use of roving border patrols to search vehicles without warrant or probable cause) would not be applied retroactively to searches prior to the decision, even though the cases were pending on direct review at the time of the decision. The reliance on Bowen and

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3/ Petitioner cites the Court's reference to the 'longstanding and widespread practice' of allowing warrantless arrest entries. Petition, page 9. However, the Court referenced state court decisions only and not federal court decisions. 445 U.S. at 600.

WALTER, FINERTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 478-0788

Peltier in this regard is misplaced in that Bowen and Peltier are exceptions to the general rule of applicability of new principles to cases pending on direct review. Bowen and Peltier were based on the Court's conclusion that "[i]t was in reliance upon a validly enacted statute, supported by long-standing administrative regulations and continuous judicial approval, that border patrol agents stopped and searched." (Emphasis added) Peltier, 422 U.S. at 541.4/ As the Peltier dissent pointedly noted, the analysis was a startling departure from the settled principle established in Linkletter, 422 U.S. at 550-551, and it was not justified notwithstanding the strong reliance by law enforcement officers on the purported long-standing regulations and judicial approval. A fortiorari, in the instant case, a departure from the settled principle is not warranted in view of the absence of any judicial or legislative approval of warrantless arrest entries in a home.

Moreover, in Steagald v. United States, No. 79-6777 (April 21, 1981), the Court expressly relied on Payton to hold a warrantless search prior to the Payton decision to be uncon-

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4/ In Peltier, the Court also distinquished Linkletter by noting that by the time Linkletter was decided, Mapp v. Ohio, 367 U.S. 643 (1961), had already been applied to three cases pending before the Supreme Court on direct review. 422 U.S. 535, n. 5. In this respect, the instant case is closely akin to Linkletter in that since the Payton decision, the Court has vacated judgments in a number of cases (See, e.g., Bush v. Florida, 446 U.S. 902, on remand sub nom. Busch v. United States, 392 So.2d 272 (Fla. Dist. Ct. App. 1980); Brown v. Florida, 446 U.S. 902, on remand 392 So.2d 280 (Fla. Dist. Ct. App. 1980), petition for cert. pending (No. 80-1644, filed March 27, 1981)). Similarly, the Ninth Circuit has repeatedly and correctly applied the principles of Payton and Prescott to cases pending on direct review at the time of the decisions. United States v. Blake, supra; United States v. Stubblefield, 621 F.2d 980 (9th Cir. 1980); United States v. Gray, 626 F.2d 102 (9th Cir. 1980). For other examples of court of appeals decisions applying Payton, see United States v. Velasquez, 626 F.2d 314 (3d Cir. 1980); Wanger v. Bonner, 621 F.2d 675 (5th Cir. 1980) and Wallace v. King, 626 F.2d 1157 (4th Cir. 1980).

WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 478-9788

stitutional. True, the Court did not expressly decide the Payton retroactivity issue. However, the Court's silence with respect to the retroactivity of Payton, coupled with the extension of Fourth Amendment protections in Steagald, is implicit acceptance of Payton's retroactivity, at least with respect to cases pending on direct review.

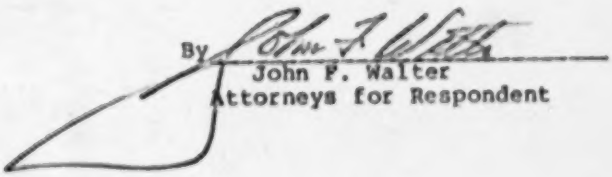
CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

DATED: June 12, 1981.

Respectfully submitted,

WALTER, FINESTONE & RICHTER
JOHN F. WALTER

By 
John F. Walter
Attorneys for Respondent

WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 475-9755

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of this Court and counsel of record for respondent herein. On this 12th day of June 1981, one copy of the foregoing Motion For Leave To Proceed In Forma Pauperis and Brief In Opposition To Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit was mailed, first class, postage prepaid, at Los Angeles, California as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

Lourdes G. Baird
United States Attorney
1200 United States Courthouse
312 North Spring Street
Los Angeles, California 90012

I certify under penalty of perjury that the foregoing is true and correct and that this Certificate is executed this 12th day of June 1981 at Los Angeles, California.

JOHN F. WALTER

WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 478-9788

CERTIFICATE OF FILING

I hereby certify that I am a member of the bar of this Court and am counsel of record for respondent herein. On June 12, 1981, an original and one copy of a Motion For Leave To Proceed In Forma Pauperis, an original and ten copies of Brief In Opposition To Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit, and an original and one copy of an Appearance Form were deposited in the United States mail at Los Angeles, California, with first class postage prepaid, properly addressed to the Clerk of this Court at United States Supreme Court Building, First Street N.E., Washington, D.C. 20543.

I certify under penalty of perjury that the foregoing is true and correct and that this Certificate Of Filing is dated this 12th day of June 1981 at Los Angeles, California.

JOHN F. WALTER

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

Subscribed and sworn to before me this 12th day of June 1981.

OFFICIAL SEAL
SHELLEY E. KILLION
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires July 21, 1981

Notary Public In And For Said
County And State

WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 478-5788

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No. 80-1608

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

RAYMOND EUGENE JOHNSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

ELLIOTT SCHULDER
Assistant to the Solicitor General

PATTY MERKAMP STEMLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the exclusionary rule requires the suppression of evidence obtained following a warrantless entry into respondent's house in the course of arresting him on probable cause, where the entry occurred prior to both this Court's decision in *Payton* v. *New York*, 445 U.S. 573 (1980), and the decision of the Ninth Circuit in *United States* v. *Prescott*, 581 F.2d 1343 (1978).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Summary of argument	8
Argument:	
The decisions requiring warrants for arrest entries into suspects' homes should not be applied to suppress evidence obtained as a result of arrest entries antedating those decisions	11
A. A decision resolving a previously unsettled Fourth Amendment issue should not be applied retroactively	14
B. The arresting agents were not acting in violation of existing constitutional standards	19
C. The fact that respondent's case was pending on direct review when *Payton* and *Prescott* were decided does not justify suppression of the evidence against him	34
Conclusion	38

TABLE OF AUTHORITIES

Cases:

Alderman v. *United States*, 394 U.S. 165 18
Almeida-Sanchez v. *United States*, 413 U.S. 266 ..... 14, 30, 36
Arkansas v. *Sanders*, 442 U.S. 753 28
Bowen v. *United States*, 422 U.S. 916 36
Brown v. *Florida*, 446 U.S. 902 35
Bush v. *Florida*, 446 U.S. 902 35
Coolidge v. *New Hampshire*, 403 U.S. 443 ..... 20, 26, 31
Desist v. *United States*, 394 U.S. 244 ..... 9, 16, 17, 30, 31, 35
Elkins v. *United States*, 364 U.S. 206 9
Fuller v. *Alaska*, 393 U.S. 80 16

Cases—Continued Page

Gerstein v. *Pugh*, 420 U.S. 103 20
Hankerson v. *North Carolina*, 432 U.S. 233 35
Hill v. *California*, 401 U.S. 797 35
Jack v. *United States*, 387 F.2d 471, cert. denied, 392 U.S. 934 23
Jones v. *United States*, 357 U.S. 493 20
Katz v. *United States*, 389 U.S. 347 31
Linkletter v. *Walker*, 381 U.S. 618 .....8, 16, 17, 19, 32, 35
Mapp v. *Ohio*, 367 U.S. 643 .....16, 17, 19
Michigan v. *DeFillippo*, 443 U.S. 31 19
Michigan v. *Tucker*, 417 U.S. 433 15
Miller v. *United States*, 357 U.S. 301 27
Munoz v. *United States*, 325 F.2d 23 23
Ng Pui Yu v. *United States*, 352 F.2d 626 23
Payton v. *New York*, 445 U.S. 573 .....*passim*
People v. *Privett*, 55 Cal. 2d 698, 361 P.2d 602, 12 Cal. Rptr. 874 26
People v. *Ramey*, 16 Cal. 3d 263, 545 P.2d 1333, 127 Cal. Rptr. 629 ..... 26, 27
Rakas v. *Illinois*, 439 U.S. 128 18-19
Steagald v. *United States*, No. 79-6777 (Apr. 21, 1981) 36-37
Stone v. *Powell*, 428 U.S. 465 .....8, 9, 13, 18
Stovall v. *Denno*, 388 U.S. 293 37
United States v. *Blake*, 632 F.2d 731.....7, 10, 23, 25, 26, 28, 31, 32
United States v. *Caceres*, 440 U.S. 741 33
United States v. *Calandra*, 414 U.S. 338 .....9, 13, 17, 34
United States v. *Calhoun*, 542 F.2d 1094 ..... 24, 25
United States v. *Corcione*, 592 F.2d 111, cert. denied, 440 U.S. 975 ..... 27, 28
United States v. *Di Re*, 332 U.S. 581 27
United States v. *Escalante*, 554 F.2d 970, cert. denied, 434 U.S. 362 26
United States v. *Flickinger*, 573 F.2d 1349, cert. denied, 439 U.S. 836 24
United States v. *Gillespie*, No. 81-879 (filed Nov. 10, 1981) 36
United States v. *Havens*, 446 U.S. 620 17
United States v. *Janis*, 428 U.S. 433 ..... 8-9, 18

Cases—Continued — Page

United States v. *Masterson*, 529 F.2d 30, cert. denied, 426 U.S. 908 24
United States v. *McLaughlin*, 525 F.2d 517, cert. denied, 427 U.S. 904 24
United States v. *Payner*, 447 U.S. 727 19
United States v. *Peltier*, 500 F.2d 985, rev'd, 422 U.S. 531 ..... *passim*
United States v. *Phillips*, 497 F.2d 1131 ..... 24, 25
United States v. *Prescott*, 581 F.2d 1343 ..... *passim*
United States v. *Reed*, 572 F.2d 412, cert. denied, 439 U.S. 913 ..... 28, 33
United States v. *Ross*, 655 F.2d 1159, cert. granted, No. 80-2209 (Oct. 13, 1981) 10-11, 28, 29, 31, 33, 36
United States v. *Santana*, 427 U.S. 38 ..... 6, 7, 12
United States v. *Stewart*, 650 F.2d 178 36
United States v. *Tucker*, 610 F.2d 1007 28
United States v. *Watson*, 423 U.S. 411 ..... 12, 20, 27
United States v. *Williams*, 622 F.2d 830, cert. denied, 449 U.S. 1127 15
Williams v. *Gould*, 486 F.2d 547 23-24
Williams v. *United States*, 273 F.2d 781, cert. denied, 362 U.S. 951 23
Williams v. *United States*, 401 U.S. 646 ..... 9, 16, 32, 35

Constitution and statutes:

United States Constitution, Fourth Amendment ..... *passim*
18 U.S.C. 2 2
18 U.S.C. 641 2
18 U.S.C. 1703 2

Miscellaneous:

1 Blackstone, *Commentaries* (15th ed. 1809) 32
Note, *Retroactivity and the Exclusionary Rule: When Do The Policies Underlying The Exclusionary Rule Warrant Its Retroactive Application?*—United States v. Peltier, *422 U.S. 531 (1975)*, 13 Am. Crim. L. Rev. 317 (1975) 29

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 626 F.2d 753. The order amending that opinion (Pet. App. 12a-13a) and the court of appeals' two prior opinions (Pet. App. 14a-22a; *id.* at 23a-30a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 31a) was entered on September 2, 1980. A petition for rehearing was denied on December 29, 1980 (Pet. App. 32a). Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including March 23, 1981. The petition was filed on that date and was granted on

October 5, 1981 (J.A. 9). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Central District of California, respondent was convicted of aiding and abetting the obstruction of correspondence, in violation of 18 U.S.C. 1703 and 2. Respondent's sentence was suspended in favor of five years' probation.[1]

1. The evidence at the suppression hearing and at trial showed that on March 30, 1977, Lena Kearney received in the mail an envelope addressed to Elihu Peterson (Tr. 351). Kearney held the envelope up to the light and discovered that it contained a Department of Treasury check for $4,681.41 (Tr. 351). Kearney contacted her sister-in-law, Wynona Wilkins, and the two women decided to attempt to cash the check (Tr. 352-353, 368, 433-434).

Wilkins requested co-defendant Oscar Joe Dodd to assist in cashing the check (Tr. 354, 364-365, 434). The next day, Dodd, respondent and Eugene McCardell went to Kearney's house, where they examined the check and discussed possible ways of cashing it (Tr. 374-375, 520). Respondent picked up the check and made a telephone call. During this call, he discussed the fact that he had a check that he wanted to cash and that the age of the payee,

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[1] Respondent, together with co-defendant Oscar Joseph Dodd, was charged in a two-count indictment with aiding and abetting the obstruction of correspondence, and with receiving stolen government property, in violation of 18 U.S.C. 641. Respondent was convicted on the obstruction of correspondence count but was acquitted on the stolen property count. Dodd was convicted on both counts and appealed; the court of appeals affirmed his conviction in a separate opinion.

which was shown on the check, would make it difficult to cash (Tr. 377, 412-413). Upon completion of the call, respondent turned to Dodd and McCardell and announced that he believed he had located someone who could assist them in cashing the check (Tr. 377, 384-385). The three men then left Kearney's house with the check in their possession (Tr. 387, 482, 669).

Thereafter, in the course of investigating this matter, Special Secret Service Agent Richard J. Hemenway interviewed Lena Kearney, who revealed details of respondent's participation in the scheme to negotiate the check (Tr. 258, 259). She related that respondent, whom she identified from a photo spread, had been present at the March 31 meeting at her house and had participated in the discussion of the plans for cashing the check. She also stated that respondent had made a telephone call in an attempt to find someone to cash the check (Tr. 138-139, 258-259, 472). Wynona Wilkins confirmed that respondent had been present at the March 31 meeting at Kearney's house and that there had been a discussion with respect to the possibility and difficulties of cashing the check (Tr. 438-441). In addition, Wilkins informed Agent Hemenway that co-defendant Dodd could be reached by calling respondent's telephone number. Further investigation revealed that respondent and Dodd were classified as associates in the criminal history files of the Los Angeles Police Department (Tr. 471-472).

On May 5, 1977, at about 6:00 p.m., Agents Hemenway and Pickering went to respondent's house to question him about his role in the check cashing scheme (Tr. 115, 140). Although the agents had obtained a warrant for Dodd's arrest, they had not obtained one for respondent (Tr. 139). After watch-

ing the residence for a short time the agents observed respondent's car pull into his driveway and the two occupants of the car enter respondent's residence (Tr. 498). The agents then approached the front door and drew their weapons, pointing them downward (Tr. 135, 169, 489-490). Agent Hemenway knocked on the door and identified himself, using a fictitious name (Tr. 504). When respondent opened the door, Agent Hemenway identified himself and Agent Pickering as Secret Service agents and displayed his badge (Tr. 115, 477). Respondent invited the agents into his house (Tr. 182, 477, 491).

Agent Hemenway conducted a brief security check of the house (Tr. 491). After Hemenway asked a woman who was present to come into the living room, the agents holstered their weapons (Tr. 115, 185). Hemenway then asked respondent to step into the bedroom (Tr. 116). After being advised of his constitutional rights, respondent told Agent Hemenway that he was willing to cooperate (Tr. 481). During the ensuing discussion, respondent revealed his involvement in the scheme to cash the Treasury check (Tr. 118, 127). The agents then informed respondent that he was under arrest (Tr. 128, 169). The agents and respondent left the residence and went to the police station, where respondent, after again being advised of his constitutional rights, signed a written statement detailing his involvement in the scheme (Tr. 128-134, 155-161). The check eventually was found in McCardell's vehicle (Tr. 489).

Prior to trial, respondent sought suppression of his oral and written statements as the fruits of an unlawful arrest that was not supported by probable cause. The district court denied respondent's motion, finding that, even though they initially did not have

probable cause to arrest respondent, the agents acted properly in going to respondent's house to question him about the crime (J.A. 7). The court further found that respondent had not been arrested until after he voluntarily admitted his participation in the check cashing scheme, and that at that point the agents had probable cause to arrest him (*ibid.*).

2. On respondent's appeal, the court of appeals initially affirmed his conviction. In its first opinion, filed on December 19, 1978 (Pet. App. 23a-30a), the court concluded that, even though the agents testified that they had not intended to effect an arrest when they initially entered respondent's residence, "[respondent's] arrest occurred immediately upon the entry of the agents into [respondent's] home" (*id.* at 26a).[2] While diverging from the reasoning of the district court, the court of appeals nonetheless concluded that the motion to suppress respondent's statements had been properly denied because the agents had probable cause to arrest respondent prior to their entry. While noting that "[i]t certainly would have been preferable had the agents obtained a warrant" for respondent's arrest before entering his residence, the court held that "if probable cause exists for the arrest, [respondent's] constitutional

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[2] The court reasoned that, regardless of the agents' subjective intentions, the determination whether an arrest has occurred depends upon an objective "evaluation of what a person innocent of a crime would have thought of the situation, given all of the factors involved" (Pet. App. 25a-26a). In light of the facts that the agents were armed when they entered respondent's house and that their weapons remained drawn while one of the agents remained with respondent and the other searched the house, the court concluded that "a reasonable person, under those circumstances, would have thought that he was under arrest" (*id.* at 26a).

rights were not violated by the warrantless arrest, even though there may have been time to have obtained a warrant for his arrest" (*id.* at 26a-27a).

On August 20, 1979, the court of appeals issued an amended opinion (Pet. App. 14a-22a) to address the applicability to this case of its decision in *United States* v. *Prescott*, 581 F.2d 1343 (9th Cir. 1978), which had held that a warrantless entry into a third party's residence to arrest a suspect on probable cause violated the Fourth Amendment.[3] The court concluded that respondent's arrest occurred, not after the agents' entry into his house, as it previously had found, but prior to the entry, when respondent opened the door "and was first confronted by the agents with their guns drawn" (Pet. App. 17a; see *id.* at 18a). Accordingly, the court held that respondent's subsequent statements were admissible because the arrest was valid under *United States* v. *Santana*, 427 U.S. 38 (1976) (Pet. App. 18a). The court distinguished *Prescott* on the ground that that case involved a forcible entry to effect an arrest, whereas here respondent was arrested in the doorway and the agents' subsequent entry was at respondent's invitation (Pet. App. 18a-19a).

Following this Court's decision in *Payton* v. *New York*, 445 U.S. 573 (1980), the court of appeals issued another opinion, this time reversing respondent's conviction (Pet. App. 1a-11a). The court recognized that, unlike the situation in *Riddick* v. *New York*, the companion case to *Payton*, the agents in this case did not enter respondent's residence prior to effecting his arrest (Pet. App. 7a). Nonetheless,

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[3] Although *Prescott* had been decided on September 14, 1978, prior to the court's first opinion in this case, that opinion made no mention of *Prescott*.

relying on the "strong language" in *Payton* "emphasizing the special protection the Constitution affords to individuals within their homes" (Pet. App. 7a), the court concluded that "it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home. Otherwise, arresting officers could avoid illegal 'entry' into a home simply by remaining outside the doorway and controlling the movements of suspects within through the use of weapons that greatly extend the 'reach' of the arresting officers" (*ibid.*). Accordingly, the court held that the warrantless arrest violated respondent's Fourth Amendment rights (*ibid.*).[4] Having determined that the arrest was unlawful, the court went on to hold that even though respondent's confessions were voluntary, they should have been suppressed as fruits of that arrest (*id.* at 8a-11a).

In response to the government's argument, in its petition for rehearing, that the principles of *Payton* should not be applied retroactively, the court of appeals revised its amended opinion to include a footnote explaining that its decision rested on the principles announced in both *Payton* and its own decision in *United States* v. *Prescott*, *supra* (Pet. App. 12a-13a). Although respondent's arrest occurred prior to either of those decisions, the court pointed out that in *United States* v. *Blake*, 632 F.2d 731 (9th Cir. 1980), it had held that the rule of *Prescott* applied retroactively in the Ninth Circuit to arrest entries that occurred prior to *Prescott* (Pet. App. 13a).

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[4] The court sought to distinguish the doorway arrest in this case from that in *United States* v. *Santana*, *supra*, on the ground that respondent did not voluntarily expose himself to public view but rather was induced to open his door when the agents misrepresented their identities (Pet. App. 6a-7a).

SUMMARY OF ARGUMENT

The warrantless entry into respondent's home took place in May 1977, nearly three years before this Court's decision in *Payton* v. *New York*, 445 U.S. 573 (1980), and more than 16 months before the Ninth Circuit's decision in *United States* v. *Prescott*, 581 F.2d 1343 (1978). At the time of the entry, therefore, neither this Court nor the Ninth Circuit had held that under the Fourth Amendment law enforcement officers were required to obtain an arrest warrant before entering a suspect's house to arrest him on probable cause. And, as the Court observed in *Payton* (445 U.S. at 600), the practice of conducting warrantless arrest entries was "longstanding" and "widespread". Indeed, in this very case the panel's first opinion held, at least implicitly, that warrantless arrest entries are lawful if supported by probable cause (Pet. App. 26a-27a). The court of appeals in its final opinion nevertheless held that the principles announced in *Payton* and *Prescott* governed the agents' conduct in this case, and that therefore the evidence obtained following the warrantless entry into respondent's house had to be suppressed.

The decision to apply *Payton* and *Prescott* retroactively to a case such as this one is based on a fundamental misconception of the nature of the Fourth Amendment's exclusionary rule. The principal purpose of the exclusionary rule is to deter unlawful police conduct. *Stone* v. *Powell*, 428 U.S. 465, 486 (1976). The rule "is not calculated to redress the injury to the privacy of the victim of the search or seizure, for any '[r]eparation comes too late.'" *Ibid.*, quoting from *Linkletter* v. *Walker*, 381 U.S. 618, 637 (1965). See *United States* v. *Janis*, 428

U.S. 433, 443 (1976); *Desist* v. *United States*, 394 U.S. 244, 249 (1969); *Elkins* v. *United States*, 364 U.S. 206, 217 (1960). Rather, the rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974). Although the exclusionary rule also has been described as serving the imperative of judicial integrity, the Court's decisions demonstrate that this justification plays only a limited role in determining whether to apply the rule in a particular situation. *Stone* v. *Powell*, *supra*, 428 U.S. at 485.

Furthermore, in the Fourth Amendment context, the price of the exclusionary rule is extremely high. Although a newly announced Fourth Amendment doctrine "raises no question about the guilt of defendants convicted in prior trials" (*Williams* v. *United States*, 401 U.S. 646, 653 (1971) (plurality opinion)), when the exclusionary rule is invoked the result is that relevant, probative evidence is withheld, thus impairing the search for truth. Particularly because the constitutional guarantee against unreasonable seizures is unrelated to the fact-finding function of the criminal trial, this Court has emphasized that "the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, *supra*, 414 U.S. at 348.

In recognition of the unique characteristics of the exclusionary rule, this Court held in *United States* v. *Peltier*, 422 U.S. 531 (1975), that neither the deterrent purpose of the rule nor the imperative of judicial integrity justified the suppression of highly probative evidence where law enforcement officers obtained that evidence in good faith compliance with then-prevailing constitutional norms. Under the

standard announced in *Peltier*, the evidence in this case should not be suppressed. No legitimate purpose would be served by excluding the fruits of warrantless arrest entries that occurred prior to *Payton* and *Prescott*, because law enforcement officers conducting those entries did not know, and could not reasonably be charged with knowing, that their actions were proscribed by the Fourth Amendment.

Until *Payton*, this Court had expressly left open the question of the validity of warrantless arrest entries, and the Ninth Circuit did not resolve the question until its decision in *Prescott*. Moreover, that question was one on which the lower courts and commentators had been in sharp disagreement. It would be unrealistic to expect the arresting agents in this case to have predicted the resolution of a difficult, unsettled question of constitutional law and to have acted accordingly. Indeed, if the panel of judges in this very case was initially of the view that a warrant was not required to uphold the arrest entry into respondent's residence, it is difficult, if not impossible, to conclude that the arresting officers should have known of such a requirement.

The Ninth Circuit's conclusion in *United States* v. *Blake*, 632 F.2d 731 (1980), relied upon by the court below, that the result in *Prescott* was "clearly foreshadowed" by dicta in two pre-*Prescott* cases, applies the wrong test for assessing the retroactive application of Fourth Amendment decisions. Under the rationale of *Peltier*, the appropriate question "is not whether lawyers and judges would describe the new decision as [having been clearly foreshadowed], but whether a working patrolman can properly be charged with foreknowledge of the new decision's outcome." *United States* v. *Ross*, 655 F.2d 1159, 1190 (D.C. Cir. 1981) (en banc) (Wilkey, J., dissenting;

emphasis omitted), cert. granted, No. 80-2209 (Oct. 13, 1981). In short, police conduct cannot be measured by dicta, hints, or precatory judicial observations. In the absence of clear, settled rules, constitutional transgressions will not be sufficiently deterred to justify the high cost of suppressing probative evidence, because the officer will not know that he is trespassing into constitutionally protected areas.

Finally, the fact that respondent's case was pending on direct review when *Payton* and *Prescott* were decided does not entitle respondent to suppression of evidence for violations of the new Fourth Amendment standard established in those cases. The exclusionary rule is not a personal right but a procedural safeguard designed to deter *future* violations. The deterrent purpose of the rule would not be served by suppressing evidence seized as the result of warrantless arrest entries that occurred prior to the announcement in *Payton* and *Prescott* that such entries were unlawful; all that would be accomplished is the discharge of a wrongdoer.

ARGUMENT

THE DECISIONS REQUIRING WARRANTS FOR ARREST ENTRIES INTO SUSPECTS' HOMES SHOULD NOT BE APPLIED TO SUPPRESS EVIDENCE OBTAINED AS A RESULT OF ARREST ENTRIES ANTEDATING THOSE DECISIONS

Respondent was arrested inside his home in California on May 5, 1977. The arrest was supported by probable cause[5] but was not authorized by a

[5] The court of appeals assumed that the agents had probable cause to arrest respondent when they went to his house (Pet. App. 4a), and, in light of the information given Agent Hemenway by Lena Kearney and Wynona Wilkins (see page 3, *supra*), there is little basis for disputing that conclusion.

warrant. At the time of the arrest, neither this Court nor the Ninth Circuit had held that a warrant is required before law enforcement officers may enter a suspect's home in order to arrest the suspect on probable cause. On September 14, 1978, more than 16 months after the entry at issue here, the Ninth Circuit concluded in *United States* v. *Prescott*, 581 F.2d 1343, that the Fourth Amendment imposes such a requirement. This Court did not rule on the question until its decision in *Payton* v. *New York*, 445 U.S. 573, issued on April 15, 1980, nearly three years after respondent's arrest. Nevertheless, the court of appeals in this case held that both *Payton* and *Prescott* should be applied retroactively to suppress the fruits of a warrantless arrest entry into respondent's house (Pet. App. 5a-7a, 12a-13a).[6]

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[6] In the course of reaching its conclusion that respondent's admissions should have been excluded as evidence at his trial, the court of appeals relied upon two other propositions that we believe to be erroneous. First, it concluded that the principles of *Payton* extend to the situation in which officers possessing probable cause but no warrant, by ruse or show of weapons, cause a suspect to open the door of his house, thereby placing himself in position to be arrested without any entry into the premises (Pet. App. 7a). In our view, such a situation is governed by the principles of *United States* v. *Watson*, 423 U.S. 411 (1976), and *United States* v. *Santana*, 427 U.S. 38 (1976), upholding warrantless probable cause arrests that do not require an entry into the home, rather than by *Payton*. The gist of *Payton* is not that the home is a sanctuary against warrantless arrests, but rather that the *search* of the home resulting from an arrest entry implicates an independent interest deserving of some form of warrant protection. Accordingly, if an arrest can be effectuated without an entry into the home, the policies served by the decision in *Payton* are not implicated. (Because the present case involved an arrest

The retroactive application of the new Fourth Amendment rule announced in *Payton* and *Prescott* is contrary to this Court's long-established policy of applying the exclusionary rule only where its deterrent purpose is "most efficaciously served." *Stone* v. *Powell*, 428 U.S. 465, 487 (1976); *United States* v. *Calandra*, 414 U.S. 338, 348 (1974). Moreover, the decision below is at odds with the principles underlying the line of Fourth Amendment retroactivity cases culminating in *United States* v. *Peltier*, 422 U.S. 531 (1975).

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entry, the discussion of the foregoing issue does not appear to have been essential to the court's decision.)

Second, the court of appeals held that respondent's statements were a suppressible fruit of what it had found to be an illegal entry into his home (Pet. App. 8a-11a). While this perhaps presents a closer issue than the one discussed in the preceding paragraph, we believe the court of appeals' holding on the point is also in error. A correct "fruits" analysis calls for distinguishing between the entry into the home—which, at least after the decisions in *Prescott* and *Payton*, was unlawful—and the arrest itself, which the agents had a right to make by virtue of the information they possessed giving them probable cause to believe respondent had committed a crime. With this critical distinction in mind, it becomes clear that any evidence discovered by virtue of the officers' presence inside an arrestee's home would be a suppressible fruit of the unlawful entry, whereas evidence such as statements or items found on the arrestee's person are properly viewed as fruits of the arrest, not the entry, and should be admissible so long as the arrest was itself authorized by law.

We have, however, not presented either of the foregoing issues in our petition, and they are thus not before this Court. We accordingly assume, for purposes of this case only, that those issues were correctly resolved by the court of appeals.

A. A Decision Resolving A Previously Unsettled Fourth Amendment Issue Should Not Be Applied Retroactively

In *United States* v. *Peltier*, *supra*, the Court held that the policies underlying the exclusionary rule did not require the suppression of evidence seized in searches that concededly were unlawful under the principles announced in *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), but that were conducted prior to the date that *Almeida-Sanchez* was decided. The Court noted that new constitutional principles often have been applied retroactively where those principles are directed at remedying a prior practice that impaired the truth-finding function of criminal trials. 422 U.S. at 535. However, the Court also pointed out (*ibid.*; footnote omitted) that

> in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule, whereby concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the factfinding process, the Court has concluded that any such new constitutional principle would be accorded only prospective application.

The Court in *Peltier* then undertook to explain why it consistently had concluded that decisions expanding the scope of Fourth Amendment rights should be applied prospectively only. It noted that neither of the purposes served by the exclusionary rule—deterrence of unlawful police conduct and preservation of judicial integrity—would be served by giving retroactive effect to decisions announcing new Fourth Amendment standards. Thus, the Court observed that "the 'imperative of judicial integrity'

is * * * not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution." 422 U.S. at 537-538 (emphasis omitted). Similarly, the Court noted that " '[w]here the official action was pursued in complete good faith * * * the deterrence rationale loses much of its force' " because it " 'necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct * * *.' " *Id.* at 539, quoting *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974).[7] Accordingly, the Court concluded that "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was un-

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[7] See also *United States* v. *Williams*, 622 F.2d 830, 840 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981), where the Fifth Circuit held that

> evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized. We * * * so [hold] because the exclusionary rule exists to deter willful or flagrant actions by police, not reasonable, good-faith ones. Where the reason for the rule ceases, its application must cease also.

While there would appear to be substantial reasons for this Court to adopt a general and relatively broad "good faith" exception to the exclusionary rule in an appropriate case, we do not believe that it is necessary to do so here because respondent's suppression claim can be disposed of by reference to well settled principles that lead directly to the more specific conclusion that new Fourth Amendment rulings are to be applied prospectively only.

constitutional under the Fourth Amendment." 422 U.S. at 542.

The *Peltier* test reflects the view that the conduct of law enforcement officers must be evaluated pragmatically. The officer in the field is often forced to respond quickly to fast-moving, unpredictable events, many of which present potential dangers to the officer or to the public at large. At the same time, while the officer's conduct is circumscribed by the Constitution, he is not a constitutional scholar, and the plain language of the Constitution offers little in the way of specific guidance, "particularly * * * when the constitutional standard is as amorphous as the word 'reasonable.'" *Payton* v. *New York*, *supra*, 445 U.S. at 600.

The Court's approach in *Peltier* is consistent with its earlier decisions addressing the retroactivity issue in the Fourth Amendment context. In each of those cases, the Court concluded that the deterrent purpose of the exclusionary rule would not be served by retroactive application of new constitutional doctrines. See *Linkletter* v. *Walker*, 381 U.S. 618, 636-639 (1965); *Fuller* v. *Alaska*, 393 U.S. 80, 81 (1968); *Desist* v. *United States*, 394 U.S. 244, 249-250, 254 n.24 (1969); *Williams* v. *United States*, 401 U.S. 646, 651-656 (1971) (plurality opinion). Thus, in *Linkletter* v. *Walker*, *supra*, the Court refused to apply retroactively its decision in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), which had held that the Fourth Amendment exclusionary rule was applicable in state criminal trials. Noting that *Mapp*'s application of the exclusionary rule to state cases was premised on the "necessity for an effective deterrent to illegal police action" (381 U.S. at 636-637), the Court in *Linkletter* stated that it could

not conclude "that this purpose would be advanced by making the rule retrospective. The misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved." 381 U.S. at 637. Likewise, in *Desist* v. *United States*, *supra*, the Court observed that "[t]he exclusionary rule 'has no bearing on guilt' or 'the fairness of the trial,' " and it accordingly "decline[d] to extend the court-made exclusionary rule to cases in which its deterrent purpose would not be served." 394 U.S. at 254 n. 24, quoting from *Linkletter* v. *Walker*, *supra*, 381 U.S. at 638, 639.

The focus in the retroactivity cases on the deterrent purpose of the exclusionary rule echoes the theme of this Court's decisions concerning the application of the rule in a variety of other settings. For example, in *United States* v. *Havens*, 446 U.S. 620 (1980), the Court upheld the use of illegally seized evidence to impeach a defendant's testimony at trial. The Court concluded that the deterrent purpose of the exclusionary rule was adequately served by prohibiting the government from using the evidence to make out its case in chief, and that any increase in deterrence "by forbidding impeachment of the defendant who testifies [is] insufficient to permit or require that false testimony go unchallenged, with the resulting impairment of the integrity of the factfinding goals of the criminal trial." *Id.* at 627.

Similarly, in *United States* v. *Calandra*, *supra*, the Court refused to extend the exclusionary rule to bar the admission of illegally seized evidence in grand jury proceedings. In reaching this result, the Court stated (414 U.S. at 351-352; footnote omitted):

> Any incremental deterrent effect which might be achieved by extending the rule to grand jury

> proceedings is uncertain at best. Whatever deterrence of police misconduct may result from the exclusion of illegally seized evidence from criminal trials, it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal. Such an extension would deter only police investigation consciously directed toward the discovery of evidence solely for use in a grand jury investigation. * * * We therefore decline to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury.

A like analysis was employed in *Stone* v. *Powell*, *supra*, 428 U.S. at 482-495, where the Court held that the substantial costs to society would outweigh any marginal deterrent effect that might follow from application of the exclusionary rule to permit state prisoners to relitigate search and seizure claims in federal habeas corpus proceedings. In *United States* v. *Janis*, 428 U.S. 433, 454 (1976), the Court similarly concluded that "exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion." And in *Alderman* v. *United States*, 394 U.S. 165, 174-175 (1969), the Court ruled that the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices. See *Rakas* v.

Illinois, 439 U.S. 128, 137 (1978); *United States* v. *Payner*, 447 U.S. 727, 735 (1980).[8]

There is even less reason for paying the price of the exclusionary rule in this case than in the cases discussed above. Those cases establish that even if police conduct is plainly and culpably illegal, the exclusionary rule does not bar use of the fruits of that illegality in all situations. Thus, despite the fact that the police in *Linkletter* (and in other pre-*Mapp* cases) could not reasonably have entertained any doubts that their conduct was prohibited by the Fourth Amendment, the Court nonetheless ruled that *Mapp* would not be applied retroactively to exclude the fruits of illegal searches that pre-dated *Mapp*. See *United States* v. *Peltier*, *supra*, 422 U.S. at 538. Surely the policies of the exclusionary rule are even less served by applying it here to conduct the officers had no reason to know was in violation of the Fourth Amendment.

B. The Arresting Agents Were Not Acting In Violation Of Existing Constitutional Standards

As *Peltier* teaches, in determining whether the exclusionary rule requires the suppression of respond-

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[8] In *Michigan* v. *DeFillippo*, 443 U.S. 31 (1979), the Court refused to suppress evidence seized incident to an arrest made in good-faith reliance on an ordinance later declared unconstitutional. The Court observed (*id.* at 38 n.3):

> The purpose of the exclusionary rule is to deter unlawful police action. No conceivable purpose of deterrence would be served by suppressing evidence which, at the time it was found on the person of the respondent, was the product of a lawful arrest and a lawful search. To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule.

ent's statements, the critical question is whether the arresting agents knew or should have known on May 5, 1977, that their warrantless entry into respondent's home was in violation of the Fourth Amendment—not whether light is shed on the question by subsequent judicial decisions.

1. Certainly there was nothing in this Court's cases that gave the agents knowledge that their conduct was unlawful. In *Payton* itself the Court noted that the question of warrantless arrest entries "ha[d] been expressly left open in a number of our prior opinions." 445 U.S. at 574. See *United States* v. *Watson*, 423 U.S. 411, 418 n.6 (1976); *id.* at 433 (Stewart, J., concurring); *id.* at 432-433 (Powell, J., concurring); *Gerstein* v. *Pugh*, 420 U.S. 103, 113 n.13 (1975); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 474-481 (1971); *id.* at 492 (Harlan, J., concurring); *id.* at 510-512 & n.1 (White, J., dissenting); *Jones* v. *United States*, 357 U.S. 493, 499-500 (1958).[9]

Moreover, the question that this Court left unsettled until *Payton* had been answered in different

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[9] In *Coolidge* v. *New Hampshire*, *supra*, it was stated that "[i]t is clear * * * that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is *per se* legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are *per se* unreasonable in the absence of some one of a number of well defined 'exigent circumstances.'" 403 U.S. at 477-478. However, the Court found it "unnecessary" to decide whether warrantless arrest entries were unconstitutional. *Id.* at 481. Moreover, Justice Harlan, who concurred "although not without difficulty" (*id.* at 491) in certain portions of the Court's opinion, including the portion containing the above-quoted statement, expressed the view that the Court acted wisely in leaving open the warrantless arrest entry issue. *Id.* at 492.

ways by various state and federal courts, most often in favor of the constitutionality of warrantless arrest entries. The practice of making warrantless arrest entries was described in *Payton* as "longstanding" and "widespread" (445 U.S. at 600), and the Court specifically acknowledged that "[a] majority of the States that have taken a position on the question permit warrantless entry into the home to arrest even in the absence of exigent circumstances." *Id.* at 598. In this connection, the Court pointed out that at the time of its decision 24 states permitted warrantless arrest entries, while only 15 states clearly prohibited them. *Id.* at 598-599 & nn. 46-47.[10] Furthermore, the Court noted that the federal courts of appeals were split on the constitutional validity of warrantless arrest entries. *Id.* at 575 & n.4.[11] Finally, the Court also observed that "[t]he common-law commentators disagreed sharply on the subject." *Id.* at 593.

Given this background, it is no exaggeration to state that when Agents Hemenway and Pickering entered respondent's home and arrested him, their actions implicated a perplexing constitutional question that had dramatically divided scholars and jurists alike for many years. Even had they preceded their actions by a diligent study of legal

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[10] This reckoning considerably overstates the number of jurisdictions that prohibited such entries as of May 5, 1977, when the federal agents in this case entered respondent's home. Of the ten state courts that had found such entries unconstitutional at the time of the decision in *Payton*, only three had done so prior to May 1977 (see 445 U.S. at 575 n.3).

[11] Again, only two of the decisions cited by the Court in this footnote as condemning warrantless arrest entries were handed down before the entry in the instant case.

authorities, the agents, who presumably lacked supernatural prescience, could not have discerned the answer that would ultimately be given to this difficult question, about which more learned men had argued for centuries and which sharply divided this Court in its eventual resolution. As the decision in *Peltier* recognizes, police officers should be required to conform their behavior to prevailing constitutional norms. They should not, however, be required to predict correctly the resolution of close and unsettled constitutional questions. The arresting agents in this case could not reasonably be charged with foreknowledge of the outcome of this Court's decision three years later in *Payton*, a result that was by no means a foregone conclusion. Until *Payton* was decided in April 1980, no decision of this Court was in any way intended, or could reasonably have been expected, to deter a police officer from proceeding as Agents Hemenway and Pickering proceeded. Accordingly, under the *Peltier* test, *Payton* v. *New York* should not be applied retroactively to arrest entries that took place prior to April 15, 1980.

2. We acknowledge that an earlier date could appropriately be utilized if the federal court of appeals for the circuit in which the challenged search and seizure took place had authoritatively held the conduct in question unlawful prior to the officers' action in a particular case. This point does not aid respondent, however, for there is no reasonable basis on which the agents could be charged with knowledge of a warrant requirement under the prevailing law of the Ninth Circuit at the time of the entry in May 1977. It was not until 16 months later that the Ninth Circuit concluded, in *United States* v. *Prescott*, *supra*, that absent exigent circumstances law en-

forcement officers must obtain a warrant before entering private premises to effect an arrest.[12] The court in *Prescott* expressly noted that theretofore this Court "ha[d] never resolved this issue" and that the Ninth Circuit itself "ha[d] never decided the question either." 581 F.2d at 1348.

Prior to *Prescott*, the Ninth Circuit had decided a number of cases in which law enforcement officers without warrants had arrested persons in their homes. See *United States* v. *Blake*, 632 F.2d 731, 735 n.1 (9th Cir. 1980). Until 1973, the court focused on whether the officers had probable cause to make an arrest and whether they announced their identity and purpose before entering. See, *e.g.*, *Williams* v. *United States*, 273 F.2d 781 (9th Cir. 1959), cert. denied, 362 U.S. 951 (1960); *Munoz* v. *United States*, 325 F.2d 23, 27 (9th Cir. 1963); *Ng Pui Yu* v. *United States*, 352 F.2d 626, 631 (9th Cir. 1965); *Jack* v. *United States*, 387 F.2d 471, 473 (9th Cir. 1967), cert. denied, 392 U.S. 934 (1968). In 1973 the court stated for the first time that the permissibility of a warrantless arrest entry into a home was an open question. See *Williams* v. *Gould*, 486 F.2d

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[12] Unlike *Payton* or the present case, which involved warrantless entries into the suspects' own homes, *Prescott* involved a warrantless entry into the home of a nonsuspect third party in order to arrest a fugitive who was believed to be inside. But the opinion of the court of appeals in *Prescott* did not differentiate between entries into a suspect's home and entries into a third party's residence. Thus, after *Prescott*, it was tolerably clear that a warrant was required in order to make an arrest entry inside any private dwelling within the Ninth Circuit. See *Payton* v. *New York*, *supra*, 445 U.S. at 575 n.4 (listing *Prescott* among those court of appeals decisions that imposed a warrant requirement on arrest entries into a suspect's residence).

547, 548 (9th Cir. 1973). Soon thereafter, in the course of holding that officers making an arrest entry lacked sufficient grounds for believing the suspect to be on the premises, the court did state in dictum that arrest entries require arrest warrants. *United States* v. *Phillips*, 497 F.2d 1131, 1135 (9th Cir. 1974). That this dictum was not regarded as an authoritative disposition of the issue is evident from subsequent cases clearly recognizing the issue as unsettled and avoiding its decision by finding that any error in the admission of evidence was harmless, *United States* v. *Masterson*, 529 F.2d 30, 31 (9th Cir.), cert. denied, 426 U.S. 908 (1976), or that the arrests were justified by exigent circumstances. *United States* v. *McLaughlin*, 525 F.2d 517, 520 (9th Cir. 1975), cert. denied, 427 U.S. 904 (1976); *United States* v. *Flickinger*, 573 F.2d 1349, 1354 (9th Cir.), cert. denied, 439 U.S. 836 (1978)[13].

Apparently then, at the time of the entry at issue here, it was common practice among law enforcement officers in the Ninth Circuit to enter private dwellings without a warrant in order to effectuate a felony arrest on probable cause. Indeed, the practice had such widespread acceptance that respondent initially based his suppression claim solely on the issue of probable cause to arrest. He never argued in the district court that the entry was unlawful because the arresting agents lacked a warrant.

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[13] In *United States* v. *Calhoun*, 542 F.2d 1094, 1102 (9th Cir. 1976), without expressing its own view on the question, the court noted the government's concession that a warrantless arrest entry would be unlawful in the absence of exigent circumstances, which it held did not exist on the facts of that case.

Despite this background and the Ninth Circuit's emphasis in *Prescott* that it was deciding a question that had not yet been settled either in the circuit or in this Court, the court of appeals in this case concluded, in reliance on *United States* v. *Blake*, *supra*, that the decision in *Prescott* should be given retroactive effect. Citing *United States* v. *Calhoun*, 542 F.2d 1094 (9th Cir. 1976), and *United States* v. *Phillips*, *supra*, the court in *Blake* had held that the result in *Prescott* had been "clearly foreshadowed," and that therefore the *Prescott* rule would be applied to suppress evidence seized as a result of warrantless arrest entries that pre-dated *Prescott*. The court stated that its decisions in *Calhoun* and *Phillips* "indicated that a warrant very likely was required" to justify an entry into private premises to effect an arrest. 632 F.2d at 735. While acknowledging that neither *Calhoun* nor *Phillips* had actually held that a warrant was required, and that prior to *Prescott* it had "avoided the issue repeatedly either by finding that probable cause to arrest was lacking or, when not lacking, that exigent circumstances existed," the court nevertheless concluded that its "[p]ersistent avoidance" of the issue should have "signalled" to law enforcement officers that the issue might be decided adversely to the government, and that this was sufficient to constitute a clear foreshadowing of the decision in *Prescott*. 632 F.2d at 735-736. In the alternative, the court concluded that because the "fundamental source" for *Prescott*'s holding was the sanctity of the home in England under the common law, "it is unlikely that the pre-*Prescott* 'law' of this circuit can be said to have been other than as stated in *Prescott*." 632 F.2d at 736. The court explained (*ibid.*) that

prior to *Prescott* law enforcement officials knew that this circuit's law was unsettled but that there was some drift toward a warrant requirement. To announce at this late date that prior to *Prescott* there was no warrant requirement would be to refute *Prescott*'s source and to ignore the drift that *Calhoun* and *Phillips* represent.

3. The Ninth Circuit's decision in *Blake* that *Prescott* should be applied retroactively, and the court's retroactive application of *Prescott* to suppress evidence in this case, are plainly wrong. Prior to *Prescott*, borrowing the Ninth Circuit's own words, "there was no holding which gave [federal] law enforcement agencies [in the Ninth Circuit] adequate notice of the unconstitutionality" of warrantless arrest entries. *United States* v. *Escalante*, 554 F.2d 970, 973 (9th Cir.) (en banc), cert. denied, 434 U.S. 862 (1977) (holding decisions prohibiting non-probable-cause searches of vehicles at fixed checkpoints not retroactive).[14] Indeed, in its initial opinion in the

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[14] In 1976, the California Supreme Court held, under the Fourth Amendment and its counterpart in the California constitution, that warrantless arrests within the home are *per se* unreasonable in the absence of exigent circumstances. *People* v. *Ramey*, 16 Cal.3d 263, 275-276, 545 P.2d 1333, 1340-1341, 127 Cal. Rptr. 629, 636-637. Although acknowledging that dicta in *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 447-478, and in one of its own cases, *People* v. *Privett*, 55 Cal.2d 698, 703, 361 P.2d 602, 605, 12 Cal. Rptr. 874 (1961), indicated that warrantless arrest entries might be unconstitutional (16 Cal.3d at 272-273, 545 P.2d at 1338-1339, 127 Cal. Rptr. at 634-635), the court in *Ramey* nonetheless held that the new rule imposing a warrant requirement would apply prospectively only, because the California courts in numerous prior cases had assumed the legality of warrantless arrest entries so

instant case the court of appeals upheld the warrantless arrest entry into respondent's house (Pet. App. 26a-27a). If the panel of judges in this very case did not initially believe that the Constitution required a warrant or that Ninth Circuit precedent called for such a result, it would indeed be bizarre to conclude that law enforcement officers in May 1977 should have anticipated and conformed their conduct to the impending evolution of the law.

Thus, the same considerations that impel the conclusion that this Court's decision in *Payton* should not be applied retroactively also establish the error of retroactive application of the Ninth Circuit's decision in *Prescott*. Because the arresting agents in this case did not know, and could not reasonably be charged with knowledge, that their actions violated the Fourth Amendment, the evidence they obtained was properly admitted at respondent's trial.[15]

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long as probable cause was present. 16 Cal.3d at 276 n.7, 545 P.2d at 1341 n.7, 127 Cal. Rptr. at 637 n.7.

This Court has remarked on several occasions that "in absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity." *United States* v. *Di Re*, 332 U.S. 581, 589 (1948). See *Miller* v. *United States*, 357 U.S. 301, 305 (1958); *United States* v. *Watson*, *supra*, 423 U.S. at 420-421 n.8. However, this rule is concerned only with whether the officer has affirmative authority to make an arrest, not whether his actions in making an arrest are permissible under the Fourth Amendment. Thus, the state court decision in *Ramey* was not binding on the actions of federal agents who operated within the state. Moreover, the issue in arrest entry cases is not whether the arrest itself is constitutional without a warrant, but whether the entry of a private dwelling to effect an arrest is an unlawful search. As the court of appeals noted in *Prescott*, "federal law, not state law, is controlling" on the question of the validity of warrantless arrest entries. 581 F.2d at 1348.

[15] In *United States* v. *Corcione*, 592 F.2d 111, 118 (2d Cir.), cert. denied, 440 U.S. 975 (1979), the Second Circuit refused

The principal defect in the Ninth Circuit's analysis in *Blake*, which was relied on in this case, is that it "confuse[s] the test to be applied in retroactivity cases not involving the exclusionary rule with the standard the *Peltier* decision set forth to be applied in exclusionary rule cases." *United States* v. *Ross*, 655 F.2d 1159, 1188 (D.C. Cir. 1981) (en banc) (Wilkey, J., dissenting), cert. granted, No. 80-2209 (Oct. 13, 1981).[16] See *United States* v. *Tucker*, 610 F.2d 1007, 1014 (2d Cir. 1979) (Van Graafeiland,

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to apply retroactively its decision in *United States* v. *Reed*, 572 F.2d 412 (2d Cir.), cert. denied, 439 U.S. 913 (1978), which had imposed a warrant requirement for arrest entries. The court in *Corcione* concluded that the deterrent purpose of the exclusionary rule would not be served "where police officers obtained the evidence in good faith prior to the announcement of the new constitutional principle." 592 F.2d at 118.

The good faith of the arresting agents in this case cannot seriously be questioned. The agents went to respondent's house with the intention of questioning him about his involvement in the check cashing scheme. The agents had obtained an arrest warrant for co-defendant Dodd even though no warrant was needed to arrest Dodd in a public place and neither this Court nor the Ninth Circuit had held that a warrant was required before entering a suspect's home in order to arrest him.

[16] The petition in *Ross* presented only an unresolved substantive Fourth Amendment issue regarding the application of the warrant requirement to the probable cause search of a paper bag seized from an automobile. The issue of the retroactivity of *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), discussed at some length in the majority opinion and in Judge Wilkey's dissent in *Ross*, is not before this Court. As is evident from the discussion in the text, we agree with Judge Wilkey's excellent and thorough analysis of retroactivity principles.

J., dissenting).[17] As Judge Wilkey explained in *United States* v. *Ross*, *supra*, 655 F.2d at 1188-1189 (emphasis in original; footnotes omitted):

> In situations *not* involving the retroactive application of the exclusionary remedy, a decision is limited to prospective application only if it meets each of two tests. The first of these two is a threshold test which quickly eliminates those new substantive decisions that should not seriously be considered for limitation to prospective effect. This first test was set out by the Supreme Court in *Chevron Oil Co.* v. *Huson* [404 U.S. 97 (1971)], in which the Court stated that a case must decide "an issue of first impression whose resolution was not clearly foreshadowed" [*id.* at 106] before the rule of the case can seriously be considered for prospective application only.
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> Unless the new decision meets the threshold requirements of the *Chevron Oil* test, it is ineligible for full-blown consideration for limitation to prospective application. If it meets the threshold standards, further consideration is then guided by the three factors set forth in the Supreme Court's decision in *Stovall* v. *Denno* [[388 U.S. 293, 297 (1967)]: (1) the purpose of the new result; (2) the extent to which law enforcement officials may have relied on the previous law; and (3) the impact of retroactivity on the administration of justice.

In *Peltier*, however, this Court rejected this two-step analysis in considering whether new Fourth

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[17] See also Note, *Retroactivity And The Exclusionary Rule: When Do The Policies Underlying The Exclusionary Rule Warrant Its Retroactive Application?*—United States v. Peltier, *422 U.S. 531 (1975)*, 13 Am. Crim. L. Rev. 317, 329 (1975).

Amendment decisions should be applied retroactively. The Ninth Circuit in *Peltier* had divided over whether this Court had "articulated a new doctrine" in *Almeida-Sanchez*. See *United States* v. *Peltier*, *supra*, 422 U.S. at 533-534. The dispute in the court of appeals turned on whether *Almeida-Sanchez* had "reaffirmed well-established Fourth Amendment standards" or had "disturb[ed] a long-accepted and relied-upon practice." *United States* v. *Peltier*, 500 F.2d 985, 988 (9th Cir. 1974) (en banc), rev'd, 422 U.S. 531 (1975). The focus of this Court's analysis in *Peltier*, however, was not on whether *Almeida-Sanchez* made new law, but on whether "the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." 422 U.S. at 542.[18]

Even before *Peltier*, this Court in *Desist* v. *United States*, *supra*, had rejected the argument that it

[18] We recognize that *Peltier* may perhaps be distinguished from this case on the ground that the law enforcement conduct in that case was carried out "in reliance upon a validly enacted statute, supported by longstanding administrative regulations and continuous judicial approval" (422 U.S. at 541), whereas here the agents' actions were not expressly authorized by statute and there was no recent history of affirmative judicial approval of such actions by the Ninth Circuit. But this distinction should not lead to a different result. Regardless whether a new Fourth Amendment decision actually changes prior law, answers a previously unsettled question, or reaches a result "foreshadowed" (but not yet conclusively established) by earlier decisions, the substantial costs to society outweigh whatever minimal deterrent benefit might result from excluding reliable evidence obtained by law enforcement officers in the course of a search or seizure that is established to have been unlawful only by subsequent decisions.

should give retroactive effect to its decision in *Katz* v. *United States*, 389 U.S. 347 (1967), because the result in *Katz* had been "clearly foreshadowed." The Court in *Desist* noted that "[w]hile decisions before *Katz* may have reflected growing dissatisfaction with the traditional tests of the constitutional validity of electronic surveillance, the Court consistently reiterated those tests and declined invitations to abandon them." 394 U.S. at 248 (footnote omitted). Thus, "[h]owever clearly [the] holding in *Katz* may have been foreshadowed" (*ibid.*), the Court in *Desist* concluded that *Katz* would not be applied retroactively because the deterrent purpose of the exclusionary rule "overwhelmingly supports nonretroactivity." *Id.* at 251.

Accordingly, the Ninth Circuit in *Blake* erred in basing its retroactivity inquiry on whether the result in *Prescott* had been "clearly foreshadowed." "The appropriate question to ask * * * is not whether lawyers and judges would describe the new decision as [having been clearly foreshadowed], but whether a working patrolman can properly be charged with foreknowledge of the new decision's outcome." *United States* v. *Ross*, *supra*, 655 F.2d at 1190 (Wilkey, J., dissenting; emphasis omitted).[19]

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[19] In any event, as we have shown above and as the *Prescott* panel acknowledged (581 F.2d at 1348), the result in *Prescott* was not clearly foreshadowed by the dicta in earlier Ninth Circuit cases any more than *Payton* was foreshadowed by the dictum in *Coolidge* v. *New Hampshire*, *supra*. Before *Prescott* the law in the Ninth Circuit, even under the view of the *Blake* panel, was "unsettled," although there was "some drift" toward a warrant requirement. 632 F.2d at 736. By holding that law enforcement officers in the Ninth Circuit should have caught this "drift," the court in *Blake* and in this case disregarded the *Peltier* test for assessing retroactivity questions in the context of the exclusionary rule.

The Ninth Circuit in *Blake* also erred in concluding (632 F.2d at 736) that the "law" that existed in the circuit prior to *Prescott* was no different from that announced in *Prescott*. This approach stems from the common law notion that "the duty of the court was not to 'pronounce a new law, but to maintain and expound the old one.'" *Linkletter* v. *Walker*, *supra*, 381 U.S. at 622-623, quoting from 1 Blackstone, *Commentaries* 69 (15th ed. 1809). But this Court has "firmly rejected the idea that *all* new interpretations of the Constitution must be considered always to have been the law and that prior constructions to the contrary must always be ignored." *Williams* v. *United States*, *supra*, 401 U.S. at 651 (plurality opinion) (emphasis in original).

In short, police conduct cannot be measured by dicta, hints, or precatory observations. It is difficult enough for law enforcement officers to keep abreast of established doctrine in the Fourth Amendment area, which is one of the most rapidly changing areas of the law. To expect officers to be familiar with, and conform their conduct to, subtle judicial nuances in the treatment of unsettled issues is entirely unreasonable.

Accordingly, the retroactivity of principles announced in a Fourth Amendment decision should be governed by whether the officer may properly be charged, prior to the time that decision was rendered, with knowledge that his actions were unlawful. In the absence of clear, straightforward rules, constitutional transgressions will not be effectively deterred, because the officer will have no reasonable way of knowing that he is trespassing into constitutionally protected areas.[20] Now that *Payton* has been decided,

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[20] This is not to suggest that police departments or other law enforcement agencies may not, as a matter of policy, require their officers to adhere to standards of conduct more

a clear rule has been established, and law enforcement officers may henceforth properly be charged with knowledge that warrantless arrest entries are prohibited in the absence of exigent circumstances. If, in the future, an officer disregards the *Payton* warrant requirement, the evidentiary fruits of his entry will be suppressed at trial. Knowledge of this consequence will (if the premise of the exclusionary rule is sound), deter unlawful arrest entries. But no purpose of deterrence will be served by applying the Fourth Amendment doctrine of *Payton* and *Prescott* to suppress evidence obtained as a result of arrest entries conducted prior to those decisions. As Judge Wilkey remarked in *United States* v. *Ross*, *supra*, 655 F.2d at 1192:

> Under these circumstances, suppressing the evidence [the agents obtained] is nothing short of levying an *ex post facto* penalty on utterly blameless police work undertaken in the line of duty. Suppressing the evidence in this case cannot deter the police from doing what they have no way of knowing is wrong. * * * The [court of appeals' decision] does not deter the constable from blundering by liberating the criminal. It simply liberates the criminal.

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stringent than those that are constitutionally required. See *United States* v. *Caceres*, 440 U.S. 741, 751 (1979). In fact, subsequent to the 1978 decision of the Second Circuit holding warrantless arrest entries unlawful in *United States* v. *Reed*, *supra*, the Justice Department instructed federal law enforcement agencies that they should follow the practice of procuring arrest warrants prior to entering a suspect's home to arrest him in the absence of exigent circumstances. But the failure to adopt such initiatives should not lead to the suppression of evidence where the agencies and their officers are attempting to adhere in good faith to established constitutional standards.

For those law enforcement agencies and officers who are exceptionally sensitive to deterrence by applications of the exclusionary rule, it may be argued that retroactive application of decisions like *Payton*, which resolve previously unsettled issues, will influence their conduct by deterring any actions that are not settled as being lawful. This will have the effect of causing officers to eschew both legal and illegal searches or seizures (much as overbroad statutes regulating speech activities operate to deter both constitutionally protected and unprotected behavior). While such scatter-shot deterrence will reap some benefits, it will also incur substantial costs. Even under the most positive view of the benefits of the exclusionary rule as an empirically effective mechanism for protecting the constitutional rights of the citizenry, the incremental value of deterring behavior of possible but questionable legality hardly justifies the costs of such a policy, especially when it is considered that the period of uncertainty as to any type of search and seizure activity will last only until an instance of such conduct is challenged in court and the issue is judicially resolved.

C. The Fact That Respondent's Case Was Pending On Direct Review When *Payton* And *Prescott* Were Decided Does Not Justify Suppression Of The Evidence Against Him

The exclusionary rule is a procedural safeguard implemented in an effort to prevent future Fourth Amendment violations. It is not a personal right to which respondent can lay claim. See *United States* v. *Peltier*, *supra*, 422 U.S. at 538; *United States* v. *Calandra*, *supra*, 414 U.S. at 348. Its deterrent purpose requires that any inquiry concerning implemen-

tation of the rule focus on "the time of the search, not any subsequent point in the prosecution." *Desist* v. *United States*, *supra*, 394 U.S. at 253. See *Hill* v. *California*, 401 U.S. 797, 802 (1971); *Williams* v. *United States*, *supra*, 401 U.S. at 651-652 (plurality opinion). No purpose of deterrence would be served by giving the benefit of the exclusionary rule to those who were victims of warrantless arrest entries that occurred prior to the time that this Court in *Payton*, or a controlling lower court that anticipated *Payton*, announced that such entries were unlawful. All of those unlawful entries are past history; "the ruptured privacy of the victims' homes * * * cannot be restored." *Linkletter* v. *Walker*, *supra*, 381 U.S. at 637. Moreover, the exclusion of reliable, probative evidence clearly undermines the factfinding objective of the criminal trial. See *Desist* v. *United States*, *supra*, 394 U.S. at 250. Accordingly, whatever may be the rule with respect to the retroactivity of other kinds of constitutional decisions (see, *e.g.*, *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977)), the pendency of a case at trial or on direct appeal should have no bearing on the retroactivity of newly decided Fourth Amendment principles.

Nor is it of any significance, with respect to the retroactivity issue, that following the decision in *Payton* the Court vacated the judgments in a number of cases and remanded those cases to the lower courts for further consideration in light of *Payton*. See, *e.g.*, *Brown* v. *Florida*, 446 U.S. 902 (1980); *Bush* v. *Florida*, 446 U.S. 902 (1980). The Court's summary vacation and remand orders said nothing about the subject of *Payton*'s retroactivity, and we submit that it would be improper to conclude that those orders should have the same effect as an explicit deci-

sion by this Court on the merits of the retroactivity issue. Any such conclusion is directly contrary to *Bowen* v. *United States*, 422 U.S. 916 (1975), where this Court refused to give retroactive effect to its decision in *Almeida-Sanchez* v. *United States*, *supra*, notwithstanding the fact that it previously had vacated the judgment in Bowen's case and remanded for reconsideration in light of *Almeida-Sanchez*. Relying on its decision in *Peltier*, which refused to apply *Almeida-Sanchez* retroactively even though Peltier's direct appeal was pending on the date of the decision in *Almeida-Sanchez*, this Court concluded that the reasons that dictated a holding of nonretroactivity in *Peltier* compelled a similar result in *Bowen*. 422 U.S. at 918. See *United States* v. *Stewart*, 650 F.2d 178, 179-180 (9th Cir. 1981); *United States* v. *Ross*, *supra*, 655 F.2d at 1191-1192 (Wilkey, J., dissenting).

Finally, nothing in this Court's decision in *Steagald* v. *United States*, No. 79-6777 (Apr. 21, 1981), holding that police officers must obtain a search warrant before searching for the subject of an arrest warrant in the home of a nonsuspect third party, suggests that *Payton* should be applied retroactively.[21] While the search in *Steagald* antedated the decision in *Payton*, the Court's opinion makes no reference to retroactivity considerations. Moreover, the substantive Fourth Amendment question presented in *Stea-*

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[21] We have recently filed a petition for a writ of certiorari seeking review of a decision of the Seventh Circuit that applied *Steagald* retroactively to exclude evidence found in the search of a third party's residence that took place prior to the decisions in *Steagald* and *Payton*. *United States* v. *Gillespie*, No. 81-879 (filed Nov. 10, 1981).

gald was quite different from the question that was before the Court in *Payton*. Thus, as we conceded in our brief in *Steagald* (79-6777 U.S. Br. 12, 26), even if the Court in *Payton* had not adopted an arrest warrant requirement for entries into a suspect's own house, it could still logically have required the police to secure search warrants before searching for a suspect in a third party's residence. Accordingly, in reaching the merits of the petitioner's Fourth Amendment claims, the Court in *Steagald* merely followed its general practice in criminal cases of applying a new constitutional ruling to the litigant in whose case it was announced. "Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying [litigants] the benefits of * * * decisions" announcing new rules. *Stovall* v. *Denno*, 388 U.S. 293, 301 (1967) (footnotes omitted). Accordingly, the Court's substantive holding in *Steagald*, and its silence with respect to the question of *Payton*'s retroactivity, should not be construed as an implicit acceptance of the proposition that the principles announced in *Payton* should be applied retroactively.

In sum, we submit that, consistent with this Court's practice, only the victims of warrantless arrest entries that occur after April 15, 1980, should receive the benefit of the Fourth Amendment principle announced in *Payton*, absent controlling authority establishing a similar rule in the jurisdiction in question. In the Ninth Circuit, only the victims of warrantless arrest entries occurring after September 14, 1978, should benefit from the holding of *Prescott*.

Because the entry into respondent's house occurred before *Payton* and *Prescott* advised law enforcement officers of the need for a warrant, respondent's post-arrest confessions were properly admitted into evidence at trial.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

ELLIOTT SCHULDER
Assistant to the Solicitor General

PATTY MERKAMP STEMLER
Attorney

NOVEMBER 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 388505 695

Office - Supreme Court, U.S.
FILED
DEC 29 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1608

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA,

Petitioner,

v.

RAYMOND EUGENE JOHNSON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

JOHN F. WALTER
WALTER, FINESTONE & RICHTER
10920 Wilshire Boulevard
Suite 1400
Los Angeles, California 90024
(213) 824-0800

Court Appointed Counsel for Respondent

MELINDA J. TOOCH
Of Counsel

TABLE OF CONTENTS

Page

INTRODUCTORY STATEMENT 1

SUMMARY OF ARGUMENT 1

ARGUMENT:

A. THE DECISIONS REQUIRING WARRANTS FOR ARRESTS IN A HOME ABSENT EXIGENT CIRCUMSTANCES MUST BE APPLIED RETROACTIVELY TO THIS CASE TO SUPPRESS EVIDENCE ILLEGALLY OBTAINED BY THE AGENTS 3

(1) PRIOR SUPREME COURT DECISIONS CLEARLY FORESHADOWED THE *PAYTON* DECISION 6

(2) PRIOR DECISIONS IN THE NINTH CIRCUIT CLEARLY FORESHADOWED THE *PRESCOTT* DECISION 10

(3) BASED ON THE CONDUCT OF AGENTS PICKERING AND HEMENWAY, THE PURPOSE OF THE EXCLUSIONARY RULE WILL BE EFFICACIOUSLY SERVED IN RETROACTIVELY APPLYING *PAYTON* AND *PRESCOTT* TO THIS CASE 18

B. THE FACT THAT RESPONDENT'S CASE WAS PENDING ON DIRECT REVIEW WHEN *PAYTON* AND *PRESCOTT* WERE DECIDED REQUIRES THE SUPPRESSION OF EVIDENCE ILLEGALLY OBTAINED 23

CONCLUSION 28

TABLE OF AUTHORITIES

Cases: *Page*

Almedia-Sanchez v. United States,
413 U.S. 266 27

Arkansas v. Sanders,
422 U.S. 753 5

Bowen v. United States,
422 U.S. 916 27

Bradley v. Richmond School Board,
416 U.S. 696 23

Brown v. Florida,
446 U.S. 902 25

Brown v. Louisiana,
447 U.S. 323 28

Burch v. Louisiana,
441 U.S. 1326 28

Bush v. Florida,
446 U.S. 902 25

Chimel v. California,
395 U.S. 752 26

Coolidge v. New Hampshire,
403 U.S. 443 8,9

Daniel v. Louisiana,
420 U.S. 31 27

Desist v. United States,
394 U.S. at 259 .....10.26,27

Dorman v. United States,
435 F.2d 385 12,13

Fahy v. Connecticut,
375 U.S. 85 25

Fuller v. Alaska,
393 U.S. 80 27

Gerstein v. Pugh,
420 U.S. 103 8

Goldman v. United States,
316 U.S. 129 27

Goldsmith v. United States,
439 U.S. 913 14

Hankerson v. North Carolina,
432 U.S. 233 24

Hoyt v. Florida,
368 U.S. 57 27

Johnson v. United States,
337 U.S. 10 2,7,9

Jones v. United States,
357 U.S. 493 8

Katz v. United States,
389 U.S. 347 27

Ker v. California,
374 U.S. 23 25

Lee v. Florida,
392 U.S. 378 27

Linkletter v. Walker,
381 U.S. 618 ..... *passim*

Mapp v. Ohio,
367 U.S. 643 25

Miller v. United States,
357 U.S. 301 16

O'Connor v. Ohio,
382 U.S. 286 26

Payton v. New York,
445 U.S. 573 ..... *passim*

People v. Ramey,
16 Cal. 3d 263, 127 Cal.Rptr. 629 13,16

Schwartz v. Texas,
344 U.S. 199 27

Steagald v. United States,
101 S.Ct. 1642 (1981) 9,24

Stoner v. California,
376 U.S. 483 25

Taylor v. Louisiana,
419 U.S. 522 27

Tehan v. United States ex rel. Shott,
382 U.S. 406 25

Thorpe v. Durham Housing Authority,
393 U.S. 268 23

United States v. Blake,
632 F.2d 731 ..... *passim*

United States v. Bradley,
455 F.2d 1181 14

United States v. Bustamante-Gamez,
488 F.2d 4 12

United States v. Calhoun,
542 F.2d 1094 ..... *passim*

United States v. Congote,
656 F.2d 971 18

United States v. Davis,
461 F.2d 1026 14

United States vs. Di Re,
332 U.S. 581 16

United States v. Flickinger,
573 F.2d 1349 12

United States v. Gray,
626 F.2d 102 25

United States v. Houle,
603 F.2d 1297 14

United States v. Killebrew,
560 F.2d 739 13

United States v. Martinez-Fuerte,
420 U.S. 542 7

United States v. McLaughlin,
525 F.2d 517 12

United States v.Peltier,
422 U.S. 531 ..... *passim*

United States v. Phillips,
497 F.2d 1131 2,12,17

United States v. Prescott,
581 F.2d 1343 ..... *passim*

United States v. Rabinowitz,
339 U.S. 56 26,27

United States v. Reed,
572 F.2d 412 11,14

United States v. Rombouts,
United States District Court No. Cr. 76-1540-F ..... *passim*

United States v. Ross,
655 F.2d 1159 cert. granted, No. 80-2209 (October 13, 1981) 2,4,15

United States v. Santana,
427 U.S. 38 2,7,9

United States v. Shye,
492 F.2d 886 13

United States v. Stubblefield,
621 F.2d 980 25

United States v. United States District Court,
407 U.S. 297 7

United States v. Velasquez,
626 F.2d 314 25

United States v. Watson,
423 U.S. 411 ..... *passim*

United States v. Williams,
573 F.2d 348 14

United States ex rel Wright v. Woods,
432 F.2d 1143 14

Vance v. North Carolina,
432 F.2d 984 14

Wallace v. King,
626 F.2d 1157 25

Wanger v. Bonner,
621 F.2d 675 25

Williams v. United States,
401 U.S. 646 26

Constitution:

United States Constitution, Fourth Amendment ... *passim*

INTRODUCTORY STATEMENT

The Statement of the case presented in the Brief for the United States is accepted except as indicated in the Argument herein.

SUMMARY OF ARGUMENT

Despite the fact that the warrantless arrest of respondent in his home occurred before this Court's decision in *Payton v. New York*, 445 U.S. 573 (1980) and the Ninth Circuit's decision in *United States v. Prescott*, 581 F.2d 1343 (1978), the principles announced therein should be applied to respondent. The application of *Payton* and *Prescott* to this case is appropriate under the analysis of retroactivity as expressed in *United States v. Peltier*, 422 U.S. 531 (1975).

Although the *Peltier* analysis focuses on whether the law enforcement officer had knowledge, or may be properly charged with knowledge, that the arrest was unconstitutional under the Fourth Amendment, petitioner erroneously contends that *Peltier* precludes an analysis of whether *Payton* and *Prescott* declared new law or merely reaffirmed existing consitutional principles. There is nothing in *Peltier* which would suggest that such an inquiry is foreclosed or is not relevant to the issue of the officer's knowledge of the legality of his conduct. Contrary to petitioner's contention, such an inquiry is highly relevant and becomes crucial in light of the *Peltier* analysis of whether a law enforcement officer knew or should have known that his conduct was not in accordance with the law. By foreclosing such inquiry, it would be virtually

impossible to address the question of the knowledge chargeable to a law enforcement officer.[1]

Although at the time of respondent's arrest the Supreme Court and the Ninth Circuit had expressly reserved deciding the issue of the constitutionality of warrantless arrests in the home, prior Supreme Court and Ninth Circuit decisions clearly set the stage for the ultimate ruling in *Prescott* and *Payton* and provided more than adequate forewarning to law enforcement officers that this issue would be resolved against their interests. See *Johnson v. United States*, 337 U.S. 10 (1948); *United States v. Watson*, 423 U.S. 411 (1976); *United States v. Santana*, 427 U.S. 38 (1976); *United States v. Calhoun*, 542 F.2d 1094 (9th Cir. 1976); *United States v. Phillips*, 497 F.2d 1131 (9th Cir. 1974).

Of critical import is the government's concession of this issue in *United States v. Calhoun*, 542 F.2d 1094 (9th Cir. 1976), and the warning of Hon. Warren J. Ferguson, United States District Judge for the Central District of California, in *United States v. Rombouts*, United States District Court No. Cr. 76-1540-F, that he was of the opinion that warrantless arrests in the home in the absence of exigent circumstances were illegal.

Moreover the deterrent purpose of the exclusionary rule provides an independent justification for the retroactive application of *Prescott* and *Payton* in this case in light of the actions of the arresting agents. The egregious conduct of Agents Hemenway and Pickering, who had previously obtained a warrant for the arrest of co-defendant, Dodd, in

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[1]As succinctly stated in *United States v. Ross*, 655 F.2d 1159, 1163 n.5 (D.C. Cir.) (en banc) cert. granted, No. 80-2209 (Oct. 13, 1981):

> If a decision develops no new law, then the police officer—who is charged with knowledge of the old law—should have known, and acted in a manner consistent with, the core doctrine.

entering respondent's home with guns drawn, conducting a cursory search of his home, and commandeering respondent and his wife, knowing that they did *not* have probable cause to arrest respondent, provides independent justification for retroactive application of *Prescott* and *Payton*.

Finally, the fact that this case was pending on direct review at the time of the *Payton* and *Prescott* decisions compels the retroactive application of the principle set forth in *Payton* and *Prescott*. The refusal to afford such retroactive application would result in the unequal administration of justice which result should be scrupulously avoided.

ARGUMENT

A. THE DECISIONS REQUIRING WARRANTS FOR ARRESTS IN A HOME ABSENT EXIGENT CIRCUMSTANCES MUST BE APPLIED RETROACTIVELY TO THIS CASE TO SUPPRESS EVIDENCE ILLEGALLY OBTAINED BY THE AGENTS

In *United States v. Peltier*, 422 U.S. 531 (1975), the Court fashioned a new approach in deciding Fourth Amendment exclusionary rule retroactivity cases. Pursuant to the *Peltier* analysis of retroactivity, the pivotal issue is whether the law enforcement officers' conduct was based upon a good faith reliance on existing constitutional standards. This analysis focuses on whether the law enforcement officers had knowledge or may be properly charged with knowledge that their conduct was in violation of existing constitutional standards. Petitioner, in urging this Court to apply *Peltier* and in actually applying *Peltier* to this case, erroneously interprets *Peltier* as

precluding an analysis of whether *Payton* and *Prescott* declared new law or merely reaffirmed existing constitutional principles. Relying on Judge Wilkey's dissenting opinion in *United States v. Ross*, 655 F.2d 1159 (D.C. Cir. 1981) (en banc) cert. granted, No. 80-2209 (October 13, 1981), petitioner specifically contends that in assessing the knowledge properly chargeable to the law enforcement officers it is inappropriate to determine whether or not *Prescott* or *Payton* declared new law.

The obvious flaw in petitioner's proferred application of *Peltier* is exposed by Judge Ginsburg's cogent response to Judge Wilkey in *United States v. Ross, supra*, wherein he states:

> Judge Wilkey's dissenting opinion, . . . urges that the Supreme Court's opinion in *Peltier* precludes this court from asking whether *Sanders* declared new law. It is true that the Court in *Peltier* did not set out this consideration as a separate inquiry, directing the courts instead to ask whether the police officer knew or should have known that his conduct was in accordance with the law. We believe, however, that the former inquiry is subsumed in the latter. If a decision develops no new law, then the police officer—who is charged with knowledge of the old law—should have known, and acted in a manner consistent with, the core doctrine.

655 F.2d at 1163, n.5.

Although *Peltier* may restyle the ultimate and critical issue to require an answer to the question of whether the law enforcement agents had knowledge or can they be charged with knowledge that their conduct was violative of the Fourth Amendment, the answer must continue to include an analysis of whether the constitutional principle is "new". If the constitutional principle under examination does not consti-

tute a sharp break in the law or if it was clearly foreshadowed, the law enforcement officers must necessarily be charged with knowledge that their actions were illegal.

The analysis of the court in *United States v. Ross, supra*, is instructive in this regard. In *Ross*, the court held that the Supreme Court's decision in *Arkansas v. Sanders*, 442 U.S. 753 (1979) that warrantless searches of luggage taken from automobiles in absence of exigent circumstances violate the Fourth Amendment applied retroactively to searches of closed containers seized from automobiles. In so holding, the court, in determining retroactivity in light of *Peltier*, concluded that the *Ross* facts were easily distinguishable from *Peltier*. In *Peltier*, the practice in question had received continuous judicial approval and was premised on a validly enacted statute. In *Ross*, there had been little, if any, judicial approval of the practice in issue which fact must have, at the least, created a substantial doubt in law enforcement officers' minds about the issue. The court resolved the issue by stating:

> *[D]oubts police officers may entertain are to be resolved in favor of, not against, the main rule that a warrant precede a search.* We cannot invert the Supreme Court's instructions by sanctioning police conduct of warrantless searches, subject only to the court's prior express mandate that they obtain a warrant. Rather, *we are required to adhere to the Court's command that the police obtain a warrant unless their search falls within one of the express and narrowly drawn exceptions to the warrant requirement.* Read against this background, the Court's statement in *Peltier*, that a retroactivity ruling is impermissible when a police officer believes "in good faith" that his conduct is "in accordance with the law," 42 U.S. at 538, 95 S.Ct. at 2318, must mean that [the police officer] had to believe, in good faith, that his conduct fell within one of the few, jealously drawn exceptions to the warrant requirement. In sum, if [he]

> had doubts about the meaning of *Chadwick*, he should have followed the presumption laid down in numerous Supreme Court decisions and obtained a warrant. His doubts, even after *Peltier*, should not have been resolved against the warrant requirement. (Footnotes omitted; emphasis added)

655 F.2d at 1164.

Regardless of how the inquiry is styled, in ruling on a Fourth Amendment exclusionary rule issue of retroactivity the question of whether the constitutional principle at issue is "new" must be considered. Even under the *Peltier* analysis, the state of the law must be examined in order to analyze the knowledge properly chargeable to the law enforcement agents. In this case, there is no question that *Payton* and *Prescott* merely applied familiar and longstanding constitutional principles and did not establish a new principle of law. Based upon the nature and extent of foreshadowing opinions on this issue, and the fact that Agents Pickering and Hemenway obtained an arrest warrant for co-defendant, Dodd, it can be concluded that the agents had more than sufficient knowledge of the illegality of their conduct in making the warrantless arrest of respondent in his home and, therefore, the evidence in this case must be suppressed.

(1) PRIOR SUPREME COURT DECISIONS CLEARLY FORESHADOWED THE *PAYTON* DECISION

Ahtough prior to *Payton* the Court had not expressly decided whether law enforcement officers must secure a warrant prior to entering a private residence to effect an

arrest, this grave constitutional question had been expressly reserved in a number of prior decisions. *Payton v. New York*, 445 U.S. 573, 574 (1980). The prior decisions of the Court clearly set the stage for the ultimate ruling in *Payton* and provided adequate forewarning to all observers, especially law enforcement agents, that the resolution of this issue would be adverse to law enforcement. The Court's persistent avoidance signaled judicial sensitivity to the issue which compelled law enforcement officers to recognize, however painful, that the Fourth Amendment required them to obtain a warrant prior to entering a residence to effect an arrest absent exigent circumstances. Certainly, if law enforcement officers seriously entertained any doubts regarding the Court's ultimate resolution of the issue, they should have resolved such doubts in favor of obtaining a warrant in light of the absolute absence of any statutory authority or Supreme Court decision condoning such warrantless arrests.

An uninterrupted line of authority commencing with *Johnson v. United States*, 337 U.S. 10 (1948), repeatedly emphasized the special sanctity afforded the home in the application of the Fourth Amendment. *United States v. Martinez-Fuerte*, 420 U.S. 542 (1976), *United States v. United States District Court*, 407 U.S. 297 (1972). The creation of an exception to the Fourth Amendment warrant requirement for arrests in *public* places underscored the distinction between home and public arrests. *United States v. Watson*, 423 U.S. 411 (1976).

This narrow exception was illustrated in *United States v. Santana*, 427 U.S. 38 (1976), where the Court took painstaking care to distinguish a "public" versus "private" place. 427 U.S. at 42-43. However, as it had done repeatedly

in the past,[2] the Court declined to settle the oft-reserved question of whether and under what circumstances law enforcement agents may enter a home of a suspect to make a warrantless arrest.

The Court's deliberate and thorough analysis in distinguishing public versus private places as the arena for an arrest should have provided any reasonable person with notice of the natural extension of the argument that no warrantless arrests inside a home, absent exigent circumstances, would be sanctioned.

Indeed, in *Coolidge v. New Hampshire*, 403 U.S. 443, 477-478 (1971), the Court, while finding it unnecessary to decide the ultimate question whether warrantless arrest entries into a home were unconstitutional, stated:

> [T]he notion that the warrantless entry of a man's house in order to arrest him on probable cause is *per se* legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are *per se* unreasonable in the absence of some one of a number of well-defined "exigent circumstances."

Certainly, this language was a clear warning to law enforcement officers that the Court would ultimately resolve this conflict in favor of the Fourth Amendment and condemn warrantless home arrests in the absence of exigent circumstances.

More importantly, it is inconceivable that the Court's continuous reservation of such a grave constitutional issue could have been interpreted as granting law enforcement

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[2] *United States v. Watson*, *supra*, at 418 n. 6; *Gerstein v. Pugh*, 420 U.S. 103, 113 n.13 (1975); *Coolidge v. New Hampshire*, 403 U.S. 443, 480-81 (1971); *Jones v. United States*, 357 U.S. 493, 499-500 (1958).

officers carte blanche to make warrantless home arrests. In view of the careful analysis of the boundary of public versus private portions of the dwelling in *Santana*, and in view of strong warnings in *Coolidge* and subsequent cases expounding on the need for a specific exception to justify a warrantless home arrest, any reliance by law enforcement officers on *Watson*, *Santana*, *Coolidge* or any other Supreme Court case on the issue of the constitutionality of a warrantless arrest entry into a home was totally unjustified. In *Steagald v. United States*, 101 S.CT. 1642 (1981), decided subsequent to *Payton*, the Court acknowledged the consistency of prior decisions in condemning warrantless arrest entries into a home.

> Except in such special situations [consent or exigent circumstances], we have *consistently held* that the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant. See *Payton v. New York*, 445 U.S. 573, 63 L.Ed. 2d 639, 100 S.Ct. 1371 (1980); *Johnson v. United States*, 333 U.S. 10, 13-15, 92 L.Ed. 436, 68 S.Ct. 367 (1948). (Emphasis added)

101 S.Ct. at 1647.

The plain purport of the pre-*Payton* decisions discussing this issue required even the most unsophisticated law enforcement officer to predict the result in *Payton*. *Payton* did no more than reaffirm and apply long-established principles of the Fourth Amendment that were common knowledge to even the working partolman; viz., any doubt regarding the necessity of an arrest warrant should have been resolved in

favor of securing a warrant as prescribed by the Fourth Amendment.[3]

(2) PRIOR DECISIONS IN THE NINTH CIRCUIT CLEARLY FORESHADOWED THE *PRESCOTT* DECISION

Although the Court had expressly reserved this constitutional question, many state and federal courts had decided the issue of the constitutionality of warrantless home arrests prior to respondent's arrest.[4] These cases establish unequivocal support for the conclusion that the federal law enforcement officers in this case had more than adequate notice, and therefore the knowledge required by *Peltier*, of the unconstitutionality of their warrantless arrest of respondent.

It is important to note that although prior to its opinion in *Prescott* the Ninth Circuit had on many occasions discussed the issue of warrantless home arrests, it did not clearly decide

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[3]To allow law enforcement officers unfettered discretion to resolve such doubts in a manner inconsistent with the Fourth Amendment by adopting a "let's wait-until-it's-decided approach" is a frightening prospect. As stated by Justice Brennan in his dissenting opinion in *Peltier*, quoting from Justice Fortas' dissenting opinion in *Desist v. United States*, 394 U.S. 244, 277 (1969):

> History does not embrace the years needed for us to hold, millimeter by millimeter, that such and such a penetration of individual rights is an infringement of the Constitution's guarantees. The vitality of our Constitution depends upon conceptual faithfulness and not merely decisional obedience. Certainly, this Court should not encourage police or other courts to disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided approach.

422 U.S. at 449.

[4]See citations in *Payton* at 575-576, n.3. and 4.

the issue until *Prescott*. However, the decisions relied on by *Prescott* support the conclusion that law enforcement agents in the Ninth Circuit had ample reason to know that the "practice" of conducting warrantless arrests in homes would be determined to be constitutionally impermissible.

In *United States v. Calhoun*, 542 F.2d 1094 (9th Cir. 1976), involving a 1974 arrest, the government conceded[5] that "absent exigent circumstances, the entry [into defendant's apartment] would be illegal." 542 F.2d at 1102. The court then found that there were no exigent circumstances and held the evidence seized pursuant to the arrest should have been suppressed. 542 F.2d at 1102-1103. Although the government's concession regarding the necessity of an arrest warrant foreclosed the Ninth Circuit from deciding the issue, the concession was an unequivocal and authoritative state-

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[5]Although the specific circumstances resulting in the government's apparent concession of the arrest warrant issue are not discussed in the opinion, it is clear that the government conceded that an arrest warrant was required to arrest a person in his home. The government's concession obviously was the result of the government's belief that a warrantless arrest in a home, absent exigent circumstances, would be condemned by the court. The government's knowledge of the warrant requirement must be chargeable to federal law enforcement agents in the Ninth Circuit.

As noted in the Brief for the United States at 32-33, n.20, in 1978 the Justice Department apparently instructed federal law enforcement agencies that arrest warrants should be obtained prior to entering a suspect's home in the absence of exigent circumstances. Although the Justice Department's memorandum was in response to *United States v. Reed*, 572 F.2d 412 (2d Cir.) cert. denied, 439 U.S. 913 (1978), its advice to law enforcement officers in the Ninth Circuit was at least two years late in light of the government's concession in *Calhoun, supra*. Surely the government should not be permitted to rely on the Justice Department's failure to timely advise federal law enforcement officers in the Ninth Circuit of the state of the law on this issue in support of its argument that agents Pickering and Hemenway had a good faith belief that their conduct was permissible.

ment to law enforcement agents of the government's recognition of the constitutional requirement of an arrest warrant prior to entry into a private dwelling.[6]

Similarly, in *United States v. Phillips*, 497 F.2d 1131 (9th Cir. 1974), the court considered the warrant requirement where officers entered a private dwelling (commercial building) to effect an arrest. The court analyzed whether the warrantless entry was justified relying on the criteria established in *Dorman v. United States*, 435 F.2d 385, 390 (D.C. Cir. 1970). However, in *Phillips, supra*, the court again was not required to decide the arrest warrant issue because it concluded that the arrest was illegal on the grounds that the agents lacked probable cause to believe that the defendant was in the building. 497 F.2d at 1135-1136.

Numerous other Ninth Circuit cases clearly and unmistakenly established that the only conceivable justification of a warrantless arrest inside a home in the Ninth Circuit would be the existence of exigent circumstances. See *United States v. Bustamante-Gamez*, 488 F.2d 4, 8 (9th Cir. 1973), cert. denied 416 U.S. 970 (1974); *United States v. McLaughlin*, 525 F.2d 517, 520 (9th Cir. 1975), cert. denied, 427 U.S. 904 (1976); *United States v. Flickinger*, 573 F.2d 1349, 1354 (9th Cir.), cert. denied, 439 U.S. 836 (1978).

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[6]The significance of the government's concession in *Calhoun* is demonstrated by comments in the *Preliminary Draft of Proposed Amendments To The Federal Rules of Criminal Procedure, Rules Governing Section 2254 Cases in the United States District Courts, Rules Governing Section 2255 Proceedings for the United States District Courts, and Federal Rules of Evidence*, 77 F.R.D. 507 (1978) wherein the Advisory Committee, of which former Attorney General Griffin Bell was a member, indicated: "There exists some authority, however, that except under exigent circumstances a warrant is required to enter the defendant's own premises, *United States v. Calhoun*, 542 F.2d 1094 (9th Cir. 1976); . . . ." 77 F.R.D. at 586.

In light of the plain purport in *Calhoun* and *Phillips* that a warrant would be required in effecting an arrest in a residence, it is clear that the Ninth Circuit's opinion in *Prescott* did not constitute a startling departure from any longstanding or widespread acceptable practice condoned by the court.[7] The clear import of prior Ninth Circuit cases was that warrantless arrest entries into the home were absolutely unacceptable absent exigent circumstances. Accordingly, the law enforcement officers in this case had more than adequate forewarning and are chargeable with knowledge that respondent's arrest would be illegal.[8]

Moreover, the distinct trend in other Courts of Appeals even prior to respondent's arrest was to hold warrantless home arrests unconstitutional. *Dorman v. United States*, 45 F.2d 385 (D.C. Cir. 1970); *United States v. Shye*, 492 F.2d 886 (6th Cir. 1974); *United States v. Killebrew*, 560 F.2d 739 (6th Cir. 1977). The First, Third and Fourth Circuits had also established that warrantless home arrests were

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[7]The "longstanding, widespread practice" referenced in *Payton* applied to state court decisions only. 445 U.S. at 599-600.

[8]In February 1977, Hon. Warren J. Ferguson, United States District Court Judge for the Central District of California, advised the government in *United States v. Rombouts*, U.S. District Court No. Cr. 76-1540-F that he subscribed to the principles of *People v. Ramey*, 16 C.3d 263, 127 Cal. Rptr. 629 (1976) and *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1979). Specifically, Judge Ferguson advised that it was his view that an unconsented entry by law enforcement officers into a private dwelling to make a warrantless arrest on probable cause, absent exigent circumstances, violates the Fourth Amendment. Although we cannot categorically state that Judge Ferguson's admonition was formally communicated to federal law enforcement agencies in the Central District, it is submitted that it probably was disseminated to law enforcement agencies because of the dramatic impact it would have on future prosecutions before Judge Ferguson. Respondent's arrest occurred approximately three months after Judge Ferguson's admonition.

unconstitutional, although by assumption. *United States v. Bradley*, 455 F.2d 1181 (1st Cir. 1972); *United States v. Davis*, 461 F.2d 1026 (3rd Cir. 1972); *Vance v. North Carolina*, 432 F.2d 984 (4th Cir. 1970). At about the time of respondent's arrest, the Second and Eighth Circuits had joined the trend. *United States v. Reed*, 572 F.2d 412 (2nd Cir.), cert. denied *sub nom. Goldsmith v. United States*, 439 U.S. 913 (1978); *United States v. Houle*, 603 F.2d 1297 (8th Cir. 1979). The Fifth and Seventh Circuits were the only two Circuits that had decided that such arrests were constitutional. *United States v. Williams*, 573 F.2d 348 (5th Cir. 1978); *United States ex. rel. Wright v. Woods*, 432 F.2d 1143 (7th Cir.), cert. denied, 401 U.S. 966 (1979).

Clearly, at least for federal law enforcement agents in the Ninth Circuit, the rule requiring a warrant existed prior to *Prescott*. The fact that cases prior to *Prescott* did not require the Ninth Circuit to definitively resolve the issue does not undermine the import of the distinct pronouncements on the issue.[9]

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[9]In the Brief for the United States, at 22, petitioner concedes that if the Ninth Circuit "had authoritatively held the conduct in question unlawful prior to the officers' action in a particular case" a reasonable basis for knowledge may be imputed to the officers. It is disingenuous for petitioner to argue that the Ninth Circuit had not authoritatively prohibited this conduct in light of its concession in *Calhoun* and Judge Ferguson's admonition in *United States v. Rombouts*, *supra*. If the government had any doubt whatsoever that an adverse decision on this issue was not forthcoming in *Calhoun*, the government would undoubtedly not have conceded the issue. It is virtually impossible to believe that the issue was not authoritatively resolved in the Ninth Circuit, albeit not by specific judicial pronouncement, prior to respondent's arrest. This conclusion is bolstered by the fact there were no cases in the Ninth Circuit after *Calhoun* where the government seriously argued that a warrant was not necessary to effect an arrest in a home absent exigent circumstances.

Contrary to petitioner's contention, there is no evidence that at the time of entry into respondent's home it was common practice among federal law enforcement agents in the Ninth Circuit to enter private dwellings to effect an arrest without a warrant.[10] As in *United States v. Ross, supra*, the facts of this case are easily distinguishable from *Peltier*. In *Peltier*, the practice had received continuous judicial approval and was based on a validly enacted statute. The proscribed conduct of the agents in this case and in *Payton* and *Prescott* was not authorized by statute and clearly did not have judicial approval. Accordingly, Agents Hemenway and Pickering were required to resolve their doubts, if any, in favor of obtaining an arrest warrant for respondent.

Although at the time of the *Payton* and *Prescott* decisions the majority of states that had previously taken a position on the issue of warrantless arrest entries into the home had permitted same, the decided trend in states determining the issue in more recent years was to declare said warrantless arrest entries unconstitutional. *Payton*, 445 U.S. at 598-599. As the Court in *Payton* remarked, "[v]irtually all of the state courts that have had to confront the constitutional issue

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[10]Agents Pickering and Hemenway were obviously aware of the necessity of obtaining an arrest warrant in absence of exigent circumstances by the fact that they secured an arrest warrant for respondent's co-defendant, Dodd. Petitioner's attempt to excuse Pickering and Hemenway from obtaining a warrant because they lacked supernatural prescience or could not have discerned the answer that would ultimately be given to the difficult question is patently absurd in light of the *fact* that they had obtained a warrant to arrest Dodd. If Pickering and Hemenway were capable of making such a momentous decision—to adhere to the warrant requirements for the Fourth Amendment—regarding Dodd, it is impossible to justify a different decision regarding respondent, especially when they knew that any arrest of respondent would probably occur in his home. [Tr. 140, 170]

directly have held warrantless entries into the home to arrest to be invalid in the absence of exigent circumstances." 445 U.S. at 599. Indeed, only the Supreme Court of Florida and the New York Court of Appeals in *Payton* had expressly upheld warrantless entries to arrest in the face of a constitutional challenge. Clearly, there was no existing state court authority upon which law enforcement officers could rely to support the constitutionality of warrantless home arrests.

Moreover, the California Supreme Court held in *People v. Ramey*, 16 Cal. 3d 263, 275-276, 127 Cal. Rptr. 629, 636-637 (1976), resting on both federal and state constitutional provisions, that warrantless arrests within the home are *per se* unreasonable in the absence of exigent circumstances. Although federal law, and not state law, is ultimately controlling on the issue of federal law enforcement agents' warrantless arrest entries, *Prescott*, 581 F.2d at 1348, it is well established that the law of the state where an arrest without warrant takes place may determine its validity in the absence of an applicable federal statute. *United States v. Di Re*, 332 U.S. 581, 589 (1948). *United States v. Watson*, 423 U.S. 411, 420-421 n.8 (1976); *Miller v. United States*, 357 U.S. 301, 305 (1958). Although *People v. Ramey* was not dispositive of the issue for federal law enforcement agents,[11] the decision was yet another significant signpost to federal agents, especially Secret Service Agents, who necessarily have a close working relationship with local law enforcement in the Ninth Circuit.

The Ninth Circuit's analysis in *United States v. Blake*, 632 F.2d 731 (9th Cir. 1980), applying *Prescott* retroactively, further demonstrates that, at least in the Ninth Circuit, law enforcement agents had sufficient knowledge or were charge-

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[11]It certainly was dispositive for Judge Ferguson. See footnote 8, *supra*.

able with knowledge that warrantless arrests were constitutionally impermissible.[12]

In *United States v. Blake, supra*, the court specifically found that *Prescott* was clearly foreshadowed in the Ninth Circuit:

> We readily acknowledge that these authorities [*Linkletter v. Walker*, 381 U.S. 618 (1965, *United States v. Peltier*, 432 U.S. 531 (1975)] could provide a basis for prospective application only of *Prescott* or *Payton* were we convinced that neither result was "clearly foreshadowed. On two occasions prior to *Prescott* we indicated that a warrant very likely was required to legitimate an arrest within a residence based on probable cause in the absence of exigent circumstances. *See United States v. Calhoun*, 542 F.2d 1094, 1102 (9th Cir. 1976), *cert. denied*, 429 U.S. 1064, 97 S.Ct. 792, 50 L.Ed. 2d 781 (1977); *United States v. Phillips*, 497 F.2d 1131, 1135 (9th Cir. 1974). In neither case was there a square holding to that effect, although in *Calhoun* both the government and the defendant apparently agreed that under such circumstances a warrant was required. In truth, as we indicated in *Prescott*, we avoided the issue repeatedly either by finding that probable cause to arrest was lacking or, when not lacking, that exigent circumstances existed. *Persistent avoidance signifies judicial sensitivity to the issue avoided and should alert reasonable observers to the distinct possibility that it might be decided in due course in the manner adverse to their interest.* This, we think, occurred prior to *Prescott* and constitutes a clear foreshadowing of that decision. (Footnote ommitted; emphasis added)

632 F.2d at 735-736.

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[12]Although the petitioner now strongly argues that *United States v. Blake, supra*, was erroneously decided, petitioiner chose not to file a petition for a writ of certiorari.

Petitioner argues that the principal defect in the Ninth Circuit's analysis in *United States v. Blake, supra*, relied on by the Ninth Circuit in this case, was that it confused the test to be applied in retroactivity cases not involving the exclusionary rule with the standard set forth in *Peltier*. In support of its criticism of *Untied States v. Blake, supra*, the petitioner again relies on Judge Wilkey's application of the *Peltier* test. However, the Ninth Circuit in *Blake* did apply the *Peltier* test in deciding to hold *Prescott* retroactive by its implicit analysis of the question of whether law enforcement officers in the Ninth Circuit should have had knowledge of the warrant requirement. The Ninth Circuit correctly resolved this question against the law enforcement officers by its alternative holding "that the 'law' prior to *Prescott* was as announced by *Prescott*." 632 F.2d at 736.

Similarly, the Fifth Circuit has acknowledged that *Payton* was not new law. In holding that a pre-*Payton* warrantless home arrest was illegal, relying on *Payton*, the court noted:

> The application of *Payton* to the instant case is not the retroactive application of a new rule. Indeed, in *Payton* the Court emphasized that it was simply clarifying what was already the law in most circuits. 445 U.S. at 557 and n.4.

United States v. Congote, 656 F.2d 971, 974 n.3 (5th Cir. 1981).

(3) BASED ON THE CONDUCT OF AGENTS PICKERING AND HEMENWAY, THE PURPOSE OF THE EXCLUSIONARY RULE WILL BE EFFICACIOUSLY SERVED IN RETROACTIVELY APPLYING *PAYTON* AND *PRESCOTT* TO THIS CASE

Assuming *arguendo* petitioner's position that the Court is precluded from inquiring if *Prescott* declared new law, the deterrent purpose of the exclusionary rule overwhelmingly supports retroactivity in light of the particular facts in this case. The arresting officers, Agents Pickering and Hemenway, were highly trained and experienced employees of the United States Secret Service. After they completed a lengthy and thorough investigation they concluded that there was sufficient evidence to file a criminal complaint and arrest respondent's co-defendant, Dodd. More importantly, they recognized that in absence of exigent circumstances or any other valid exception to the Fourth Amendment it was necessary to obtain an arrest warrant for respondent's co-defendant, Dodd. In light of their decision, they presented the results of their investigation to an Assistant United States Attorney who authorized the filing of a complaint against Mr. Dodd. Simultaneously with the filing of the complaint, the Magistrate issued an arrest warrant for Dodd. The decision to obtain an arrest warrant for Dodd certainy belies petitioner's argument that it is unreasonable "[t]o expect officers to be familiar with and conform their conduct to, subtle judicial nuances in the treatment of unsettled issues . . . ." Brief for the United States at 32. Moreover, Agents Hemenway and Pickering certainly were not guided or prompted by "dicta, hints, or precatory observations" in obtaining the arrest warrant for Dodd. *Ibid.* In fact, they wre guided by their obvious knowledge and understanding of the Fourth Amendment and the law of the Ninth Circuit which required them to obtain an arrest warrant in absence of exigent circumstances.

Given that Agents Pickering and Hemenway were sufficiently knowledgeable to obtain a warrant for Dodd, it is an incredible "exaggeration" by petitioner to believe "that when

Agents Hemenway and Pickering entered respondent's home and arrested him, their actions implicated a perplexing constitutional question that had dramatically divided scholars and jurists alike for many years" and that "[e]ven had they preceded their actions by a diligent study of legal authorities [they] . . . could not have discerned the answer that would ultimately be given to this difficult question . . . ." Brief for the United States at 21-22. Since Agents Hemenway and Pickering had absolutely no difficulty solving this allegedly perplexing constitutional question in Dodd's case, there is no reason to believe they could not have also similarly resolved the question in respondent's case. The agents were not in the field responding quickly to fast moving, unpredictable events. They were in the solemnity of the United States Attorney's office where, if Agents Pickering and Hemenway were truly not capable of resolving this constitutional dilemma, they could have requested advice from the Assistant United States Attorney assigned to their case.[13]

It is apparent tha the only reason that Agents Pickering and Hemenway did not secure an arrest warrant for respondent

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[13]Of course, the Assistant United States Attorney would have been fully aware of Judge Ferguson's position in *United States v. Rombouts*, United States District Court No. C.R. 1540-F.

was that they were of the opinion that they did not have adequate probable cause to arrest respondent.[14]

In analyzing whether the policy of the exclusionary rule would be undermined by affording respondent the benefits of the retroactive application of *Payton* and *Prescott*, it is important to closely scrutinize the conduct of Agents Hemenway and Pickering after they left the Assistant United States Attorney's office.[15]

According to the testimony of Agent Hemenway, the agents' intent prior to going to respondent's home was to arrest him "depending upon the degree of his statements." [Tr. 140][16] The record also demonstrates that while surveilling

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[14]Agent Pickering testified as follows:

Q Did you go there for the purpose of effecting an arrest on Mr. Johnson?

A At the time we entered the residence, no.

Q Why not?

A Because we felt or I felt that we didn't have enough probable cause to make an arrest yet.

Tr. 167.

Although the district court refused to allow trial counsel to fully explore the conversations between Agent Hemenway and the Assistant United States Attorney that authorized the complaint against Dodd [Tr. 140], we strongly suspect that the Assistant United States Attorney advised Agent Hemenway that in the absence of admissions by respondent a complaint or arrest warrant for respondent would not be authorized because there was insufficient probable cause.

[15]We strenuously disagree with petitioner's statement that the "good faith" of Agents Hemenway and Pickering cannot be seriously questioned.

[16]There is an obvious conflict in the evidence regarding petitioner's contention that the agents went to respondent's home merely to question him. In that regard, the agents' outrageous conduct once inside respondent's residence is inconsistent with petitioner's statement that the agents merely wanted to question him.

respondent's home they observed respondent's car pull into his driveway. Rather than interrogate respondent in his driveway, the agents allowed respondent and his wife to enter his residence. [Tr. 498] Once respondent was "safely" inside his home, the agents, with guns drawn and using a fictitious name, knocked on the door and gained entry into respondent's home pursuant to respondent's "invitation". After entering respondent's home, Agent Hemenway, with his gun still drawn, ordered respondent into the bedroom for questioning and ordered respondent's naked wife to dress and come out of the bedroom into the living room. [Tr. 115; 505-506] Immediately after entry and prior to questioning respondent, the agents conducted a "cursory search" of respondent's home.[17] [Tr. 115, 135] Shortly thereafter, respondent allegedly explained his involvement with the Treasury Check and he was formally arrested.[18]

The "good faith" of Agents Hemenway and Pickering is highly suspect in light of the agents' actions after gaining access to respondent's home. The agents' cursory search of

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[17]Petitioner erroneously contends that the agents conducted a brief security check once inside the home. The record is clear that Agent Hemenway conducted a "cursory search" of respondent's home. [Tr. 115, 135].

[18]It is impossible to square the agents' conduct with the remarks attributed to William Pitt, Earl of Chathan, quoted in *Prescott*:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement! (footnote omitted)
>
> It was on the same occasion that Pitt said, "Every man's house [is] his castle." *id.*, fn. 7.

581 F.2d at 1343.

respondent's home and their outrageous conduct in commandering respondent and his wife in their own home should not be tolerated in light of the alternative of questioning respondent outside his residence.[19] In addition to the agents' failure to obtain an arrest warrant for respondent, the deliberate and cavalier disregard for respondent's rights should be alone sufficient reason to justify the suppression of the evidence in this case. Consistent with *Peltier*, this is precisely the type of case where the purposes of the exclusionary rule—deterrence of unlawful police conduct and preservation of judicial integrity—would be served by affirming the Ninth Circuit's decision to afford respondent the retroactive benefits of *Payton* and *Prescott*.

B. *THE FACT THAT RESPONDENT'S CASE WAS PENDING ON DIRECT REVIEW WHEN PAYTON AND PRESCOTT WERE DECIDED REQUIRES THE SUPPRESSION OF EVIDENCE ILLEGALLY OBTAINED*

It is well-settled that a change in the law will be given retroactive effect to a case pending on direct review at the time of the decision. *Thorpe v. Durham Housing Authority*, 393 U.S. 268, 281-282 (1969). *Linkletter v. Walker*, 381 U.S. 618, 627 (1965). This principle applies whether or not the new law is expressly made applicable to pending cases. See *Bradley v. Richmond School Board*, 416 U.S. 696, 711-716 (1974). This principle is unquestionably applicable to

[19]It is not difficult to imagine that the agents, knowing that respondent had used heroin in the past [Tr. 117], wanted to gain entry into respondent's home hoping to find him in possession of narcotics.

the instant case which was pending on direct review at the time of the *Payton* and *Prescott* decisions and the Ninth Circuit did not err in applying *Payton* and *Prescott* to the case *sub judice*. The inherent injustice that results in refusing to apply the princples of a newly decided case to one pending before the same court on the same issues compels application of *Payton* and *Prescott* to this case.

Respondent's plight is substantially similar to the defendants in *Payton* and *Prescott*. In all three cases the defendants were subject to warrantless arrests in their homes during the period 1977 through early 1978. Each defendant attempted to suppress the fruits of illegal arrest entries. The defendants in *Payton* and *Prescott* enjoy the retroactive application of the constitutional principle announced in their cases. Additionally, the defendant in *United States v. Blake*, 632 F.2d 731 (9th Cir. 1980), who was arrested in November 1977 (6 months subsequent to respondent's arrest) enjoys the benefit of *Prescott* and *Payton*. The refusal to afford respondent the benefit of the retroactive application of *Payton* and *Prescott* results in the unequal administration of justice which result should be scrupulously avoided.[20]

It is also significant that prior to this case the Court had applied *Payton* to other cases pending on direct review on the date of the decision. In *Steagald v. United States*, 101 S.Ct. 1642 (1981), the Court relied on principles reiterated in *Payton* to hold a warrantless search prior to the *Payton*

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[20]As summarized by Justice Powell in *Hankerson v. North Carolina*, 432 U.S. 233, 247-248 (1976) (Powell, J., concurring):

> When the Court declines to hold a new constitutional rule retroactive, one chance beneficiary—the lucky individual whose case was chosen as the occasion for announcing the new principle—enjoys retroactive application, while other similarly situated have their claims adjudicated under the old doctrine. This hardly comports with the ideal of administration of justice with an even hand.

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decision unconstitutional, which action at the least signals an implicit acknowledgement of applicability of *Payton* to cases pending on direct review. Moreover, since *Payton*, the Court has vacated judgments in a number of cases. See, e.g., *Bush v. Florida*, 446 U.S. 902 (1980) on remand, *sub. nom. Busch v. United States*, 392 So. 2d 272, (Fla. Dist. Ct. App. 1980); *Brown v. Florida*, 446 U.S. 902 (1980), cert. pending, No. 80-1644, filed March 27, 1981.

Even more compelling is the Ninth Circuit's reliance on *Payton* and *Prescott* to cases pending on direct review since the decisions were announced. *United States v. Stubblefield*, 621 F.2d 980 (9th Cir. 1980); *United States v. Gray*, 626 F.2d 102 (9th Cir. 1980). See also: *Untied States v. Valasquez*, 626 F.2d 314 (3rd Cir. 1980);' *Wagner v. Bonner*, 621 F.2d 675 (6th Cir. 1980); *Wallace v. King*, 626 F.2d 1157 (4th Cir. 1980).

This case is closely akin to *Linkletter v. Walker*, 381 U.S. 618 (1965) and *Tehan v. United States ex rel. Shott*, 382 U.S. 406 (1966). In *Linkletter*, the Court in deciding the non-retroactivity of *Mapp v. Ohio*, 367 U.S. 643 (1961) to final judgments, affirmed the applicability of *Mapp* to cases pending on direct review at the time of the decision.[21]

Similarly, in *Tehan v. Shott, supra*, it was held that the new rule declaring it unconstitutional for a prosecutor or judge to make adverse comments upon a defendant's failure to testify in a criminal trial was not entitled to retroactive application in cases in which the judgment of conviction had been final before the date of the decision. However, the Court noted that the new rule was properly applied in the case announcing the

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[21] *Mapp* had been applied in *Ker v. California*, 374 U.S. 23 (1963), *Fahy v. Connecticut*, 375 U.S. 85 (1963), and *Stoner v. California*, 376 U.S. 483 (1964).

rule and in other cases pending on direct review at the time the rule was announced. *O'Connor v. Ohio*, 382 U.S. 286 (1965) (per curiam).

This Court and the Ninth Circuit have repeatedly applied *Payton* and *Prescott* to cases *sub judice*. Particularly here, where the Ninth Circuit has expressly held in *United States v. Blake, supra*, that *Prescott* must be applied retroactively, 632 F.2d at 735-736, the Ninth Circuit's decision must be affirmed.

> If a "new" constitutional doctrine is truly right, we should not reverse lower courts which have accepted it; nor should we affirm those which have rejected the very arguments we have embraced. Anything else would belie the truism that it is the task of this Court, like that of any other, to do justice to each litigant on the merits of his own case. It is only if our decisions can be justified in terms of this fundamental premise that they may properly be considered the legitimate products of a court of law, rather than the commands of a super-legislature.

Desist v. United States, 394 U.S. 244, 259 (1969) (Harlan, J., dissenting).

Petitioner argues that regardless of the retroactivity analysis for other constitutional decisions, the pendency of a Fourth Amendment exclusionary rule case on direct review should have no bearing on the determination of the retroactivity of a newly decided Fourth Amendment principle. Again, the pivotal issue is whether the principle involved is "new" or constitutes a sharp break in the law.

In virtually every case where the Court has sanctioned prospective application only of a new constitutional principle a previous decision of the Court had been expressly overruled. See *Williams v. United States*, 401 U.S. 646 (1971) regarding the retroactivity of *Chimel v. California*, 395 U.S. 7542 (1969), which overruled *United States v. Rabinowitz*,

339 U.S. 56 (1950) and *Harris v. United States*, 331 U.S. 145 (1947); *Fuller v. Alaska*, 393 U.S. 80 (1968) (*per curiam*) involving the retroactivity of *Lee v. Florida*, 392 U.S. 378 (1968) which overruled *Schwartz v. Texas*, 344 U.S. 199 (1952); *Desist v. United States*, 394 U.S. 244 (1969) involving the retroactivity of *Katz v. United States*, 389 U.S. 347 (1967) which specifically rejected *Goldman v. United States*, 277 U.S. 129 (1942) and *Olmstead v. United States*, 277 U.S. 438 (1928); *Daniel v. Louisiana*, 420 U.S. 31 (1975) regarding the retroactivity of *Taylor v. Louisiana*, 419 U.S. 522 (1975) which disapproved *Hoyt v. Florida*, 368 U.S. 57 (1961).

The principle articulated in *Payton* and *Prescott* did not overrule past precedent and was clearly foreshadowed. In this respect, this case is distinguishable from the plethora of cases cited above and both *Peltier* and *Brown v. United States*, 422 U.S. 916 (1975) which denied retroactive application of *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) to searches occurring prior to the decision, even though the cases were pending on direct review. An analysis of *Bowen* and *Peltier*, both exceptions to the general rule of applicability of new principles to cases pending on direct review, manifestly exposes the misplaced reliance of petitioner herein. *Bowen* and *Peltier* were based on the Court's conclusion that "[i]t was in reliance upon a validly enacted statute, supported by long-standing administrative regulations and continuous judicial approval that border patrol agents stopped and searched. . . ." *Peltier* at 541. As the *Peltier* dissent pointedly noted, the analysis was a startling departure from the settled principles established in *Linkletter* and it was not justified notwithstanding the strong reliance by law enforcement officers on the purported longstanding regulations and judicial approval. 422 U.S. at 550-551.

Similarly, in *Brown v. Louisiana*, 447 U.S. 323 (1980), the Court granted retroactive application of the constitutional principle announced in *Burch v. Louisiana*, 441 U.S. 1326 (1979) (a defendant's conviction of a nonpetty criminal offense by a nonunanimous six-person jury violated the accused's right to trial by jury) emphasizing the minimal justifiable reliance on the old standards. "Unlike other cases that have been accorded prospective effect only, *Burch* did not overrule any prior decisions of this Court or invalidate a practice of heretofore unquestioned legitimacy." 447 U.S. at 335.

In light of the fact that *Payton* and *Prescott* did not overrule prior decisions of the courts and merely reaffirmed existing constitutional principles, a departure from the well-settled principle applying new decisions to cases pending on direct review is not warranted.

If the Court is not persuaded to apply the principles of *Payton* and *Prescott* retroactively to all cases, at a minimum, it should affirm the Ninth Circuit's decision applying *Payton* and *Prescott* to this case is *sub judice*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JOHN F. WALTER
WALTER, FINESTONE
& RICHTER
10920 Wilshire Boulevard
Suite 1400
Los Angeles, California
90024

Court Appointed Counsel
for Respondent

MELINDA J. TOOCH
Of Counsel

Office - Supreme Court, U.S.
FILED
FEB 17 1982
ALEXANDER L. STEVAS,
CLERK

No. 80-1608

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

RAYMOND EUGENE JOHNSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Ashwander v. *TVA*, 297 U.S. 288 4

Barrett v. *United States*, 423 U.S. 212 3

Dandridge v. *Williams*, 397 U.S. 471 4

Desist v. *United States*, 394 U.S. 244 7

Fahy v. *Connecticut*, 375 U.S. 85 8

Jack v. *United States*, 387 F. 2d 471, cert. denied, 392 U.S. 934 2

Johnson v. *United States*, 333 U.S. 10 2

Kastigar v. *United States*, 406 U.S. 441 3

Ker v. *California*, 374 U.S. 23 ..... 2, 8

Michigan v. *Summers*, No. 79-1794 (June 22, 1981) 7

Payton v. *New York*, 445 U.S. 573 ..... 1, 2, 3, 4, 5, 6, 7

Permian Basin Area Rate Cases, 390 U.S. 747 ... 3

Rosenberg v. *Fleuti*, 374 U.S. 449 4

Sabbath v. *United States*, 391 U.S. 585 2

Stoner v. *California*, 376 U.S. 483 8

United States v. *Caceres*, 440 U.S. 741 4

United States v. *Calhoun*, 542 F. 2d 1094 3

United States v. *Congote*, 656 F. 2d 971 5

United States v. *Cravero*, 545 F. 2d 406, cert. denied, 429 U.S. 1100 7

Page

Cases—Continued:

United States v. *Dien*, 609 F. 2d 1038, adhered to on rehearing, 615 F. 2d 10 7

United States v. *Gardner*, 627 F. 2d 906 7

United States v. *Hofman*, 488 F. 2d 287 5

United States v. *Peltier*, 422 U.S. 531 ..... 4, 6, 8

United States v. *Prescott*, 581 F. 2d 1343 ..... 1, 2, 3, 4, 5, 6, 7

United States v. *Rich*, 518 F. 2d 980 7

United States v. *Savage*, 564 F. 2d 728 5

United States v. *Williams*, 573 F. 2d 348 5

United States v. *Wysocki*, 457 F. 2d 1155, cert. denied, 409 U.S. 859 5

Williams v. *United States*, 401 U.S. 646 7-8

Constitution:

United States Constitution, Fourth Amendment 1, 2, 3, 4, 5, 6, 7, 8

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1. In our opening brief we argued that the policies underlying the exclusionary rule compel the conclusion that a decision resolving a previously unsettled Fourth Amendment question should not be applied retroactively. Respondent acknowledges (Br. 2, 6-7, 10-11), as he must, that prior to *Payton* v. *New York*, 445 U.S. 573 (1980), and *United States* v. *Prescott*, 581 F. 2d 1343 (9th Cir. 1978), this Court and the Ninth Circuit had expressly reserved decision on the constitutionality of warrantless arrest entries. Nevertheless, respondent argues (Br. 6, 9) that those decisions announcing a warrant requirement for arrest entries should be given retroactive effect because they "merely applied familiar and longstanding constitutional principles and did not establish a new principle of law," and that "even the most unsophisticated law enforcement officer" should have been capable of predicting the results in those cases.

Respondent's argument is unfounded. To begin with, it is absurd to suggest that *Payton* and *Prescott* did not establish a new constitutional rule. Prior to those decisions, neither this Court nor the Ninth Circuit had held that police must obtain a warrant before entering a suspect's home in order to arrest him on probable cause. While reserving decision on the constitutionality of warrantless arrest entries, both this Court and the Ninth Circuit had, in numerous cases,[1] assumed the validity of the practice, which was approved by many common law authorities and was standard police practice in this country from its inception. The fact that the Fourth Amendment had long been construed as requiring a warrant to search for property inside private premises did not, as respondent suggests, settle the issue with respect to arrest entries. On the contrary, at the time of the entry into respondent's house many judges and commentators, who presumably were aware of the warrant requirement for searches for property inside houses, had concluded that warrants were not required for arrest entries.[2] Indeed, as we have observed in our opening brief (at 26-27), if the court of appeals judges who initially upheld the warrantless entry into respondent's house (see Pet. App. 26a-27a) did not believe, in December 1978, that the Fourth Amendment imposed a warrant requirement, law enforcement officers in

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[1]See, *e.g.*, *Sabbath* v. *United States*, 391 U.S. 585, 588 (1968); *Ker* v. *California*, 374 U.S. 23, 37-38 (1963) (plurality opinion); *Johnson* v. *United States*, 333 U.S. 10, 15 (1948); *Jack* v. *United States*, 387 F. 2d 471, 473 (9th Cir. 1967), cert. denied, 392 U.S. 934 (1968).

[2]We note that respondent considerably overstates (Br. 13-14, 15-16) the number of federal and state appellate courts that had prohibited warrantless arrest entries as of May 5, 1977, the date of the entry in this case. See our opening brief at 21, nn.10 & 11.

the Ninth Circuit should not be charged with having known, in May 1977, that such a requirement was the law.[3]

Respondent also argues that dicta appearing in the decisions of this Court and the Ninth Circuit, and persistent avoidance of the issue, "clearly foreshadowed" the results in *Payton* and *Prescott* and should have signalled to law enforcement officers that the Fourth Amendment required warrants for arrest entries. But statements made in dicta are, by definition, "unnecessary to [a court's] decision, and cannot be considered binding authority." *Kastigar* v. *United States*, 406 U.S. 441, 454-455 (1972). See *Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968). Law enforcement officers should not be compelled to adhere to superfluous language inserted into judicial decisions.[4]

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[3]It is noteworthy that respondent himself did not argue that the absence of a warrant invalidated the arrest entry until after the Ninth Circuit's decision in *Prescott*. See respondent's petition for rehearing, dated Dec. 30, 1978, at 11-12. Prior to *Prescott*, respondent had simply contended that the arrest was invalid because the agents lacked probable cause. See respondent's court of appeals brief, dated Apr. 3, 1978, at 10-18.

[4]Respondent erroneously contends (Br. 11 & n.5) that government counsel's apparent concession in *United States* v. *Calhoun*, 542 F. 2d 1094, 1102 (9th Cir. 1976), that a warrantless entry would be unlawful absent exigent circumstances, established that the government's institutional position at the time of the entry in this case was that an arrest warrant was constitutionally required in order to arrest a person in his home. It would indeed be extraordinary if the statement of a single Assistant United States Attorney in a particular case bound the government or "proved" the state of the law, and that is of course not the case. Cf. *Barrett* v. *United States*, 423 U.S. 212, 222 & n.6 (1976).

Furthermore, respondent's reliance (Br. 2, 13 n.8) on an oral statement from the bench by District Judge Ferguson in the course of denying a suppression motion in *United States* v. *Rombouts*, Cr. No. 76-1540-F (C.D. Cal.), is also misplaced. The statement was mere dictum and was not binding on the government, which had no means of obtaining review of the statement. In addition, even if Judge Ferguson had decided the arrest entry issue adversely to the government, the

Moreover, the fact that the arrest entry issue was not settled in other cases decided by this Court and the Ninth Circuit prior to *Payton* and *Prescott* did not provide notice to anyone, including law enforcement officers, that the issue eventually would be decided adversely to the government. The failure to resolve the issue earlier is attributable to the familiar principle that important constitutional questions should not be decided unnecessarily. See, *e.g.*, *Dandridge* v. *Williams*, 397 U.S. 471, 475-476 (1970); *Rosenberg* v. *Fleuti*, 374 U.S. 449, 451 (1963); *Ashwander* v. *TVA*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring).

Respondent characterizes (Br. 1, 3-4) our argument as construing *United States* v. *Peltier*, 422 U.S. 531 (1975), to hold that it does not matter for retroactivity purposes whether a Fourth Amendment decision declares new law or merely applies settled constitutional principles to the facts of the particular case. This misconstrues both our argument

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decision of one district judge is not binding on other judges within the district, and thus government agents within the district would not have been required to adhere to that decision. Respondent's approach would place an impossible burden on law enforcement officers by requiring them to conform their conduct to every suggestion made by a district judge in favor of expanding Fourth Amendment protections.

By the same token, the fact that the agents in this case obtained an arrest warrant for co-defendant Dodd does not, as respondent urges (Br. 15 n.10, 19-20), indicate that the agents were aware that the Fourth Amendment *required* them to get a warrant before arresting respondent inside his house. Respondent's bare speculation concerning the agents' subjective beliefs regarding the applicable constitutional standard underscores the problems inherent in respondent's analysis of the retroactivity question. Law enforcement agencies might be discouraged from adopting policies more protective of Fourth Amendment rights than the courts have theretofore held are constitutionally required if an occasional violation of such a policy by the agency's officers would inevitably lead to suppression upon a subsequent judicial determination that the conduct reflected in the policy is mandated by the Constitution. See *United States* v. *Caceres*, 440 U.S. 741, 755-756 (1979).

and the issue in this case. If a decision is based upon "existing constitutional principles" (Resp. Br. 4), its retroactivity is a matter of no moment in subsequent cases turning upon those preexisting principles, since the same result would be reached on the basis of those principles. Conversely, if a decision declares new law by overruling a prior decision, even respondent would agree (see, *e.g.*, Resp. Br. 26-27) that it should not be applied retroactively. The real area of dispute is whether new (and therefore nonretroactive) Fourth Amendment decisions are only those that overrule prior decisions, or also include those that resolve a previously unsettled point.

Contrary to respondent's characterization, therefore, our retroactivity analysis does start from the premise that *Payton* and *Prescott* announced new constitutional principles. In our view, a new Fourth Amendment rule is not established—and law enforcement officers may not be charged with knowledge of any such rule—until either this Court or the court of appeals for the circuit in which the challenged search or seizure took place authoritatively holds that conduct of the type in question is unlawful.[5]

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[5]Respondent claims (Br. 18) that the Fifth Circuit, in *United States* v. *Congote*, 656 F. 2d 971, 974 n.3 (1981), applied the *Payton* rule to a warrantless arrest entry that antedated the decision in *Payton*. In the course of holding that the defendant did not have "standing" to challenge the validity of a pre-*Payton* warrantless arrest entry, the court in *Congote* observed in dictum that the rule announced in *Payton* was not a "new rule" because it had previously been adopted by most of the courts of appeals. We submit that the statement in *Congote* reflects the same erroneous approach as that of respondent to the retroactivity of decisions announcing new Fourth Amendment principles. The dictum in *Congote* ignored the fact that, prior to *Payton*, the Fifth Circuit had consistently upheld warrantless arrest entries. See, *e.g.*, *United States* v. *Williams*, 573 F. 2d 348, 350 (5th Cir. 1978); *United States* v. *Savage*, 564 F. 2d 728 (5th Cir. 1977); *United States* v. *Hofman*, 488 F. 2d 287 (5th Cir. 1974); *United States* v. *Wysocki*, 457 F. 2d 1155 (5th Cir.); cert. denied, 409 U.S. 859 (1972). Thus, whatever may have been the law

Here, it is undisputed that prior to the entry into respondent's home neither this Court nor the Ninth Circuit had held unconstitutional the particular class of conduct in question—*i.e.*, the longstanding police practice of making warrantless arrest entries. Although respondent asserts (Br. 9-10) that any doubts about the need for an arrest warrant should have been resolved in favor of a warrant, respondent's approach stands the basic teaching of *Peltier* on its head. Under *Peltier*, the evidence obtained as a result of the warrantless entry into respondent's house should not be suppressed because the arresting agents did not have knowledge, and may not properly be charged with knowledge, that their conduct was unconstitutional under the Fourth Amendment. There might be some marginal deterrent benefit in requiring suppression in those situations where the police fail to resolve any doubts in favor of more stringent protections than the courts have theretofore held the Fourth Amendment to require. However, the costs to society in diminished law enforcement effectiveness greatly outweigh any incremental deterrent effect that might be achieved by applying the exclusionary rule to suppress reliable evidence seized by police officers in the course of a search or seizure that is established to have been unlawful only by subsequent decisions.

2. Respondent argues (Br. 2-3, 22-23) that certain actions by the agents after their entry into respondent's home militate in favor of retroactive application of *Payton* and *Prescott*.[6] But those decisions held only that the Fourth

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in the other circuits prior to *Payton*, law enforcement agents in the Fifth Circuit were justified in relying on the consistent line of decisions by that court of appeals upholding warrantless arrest entries. See *United States* v. *Peltier*, *supra*.

[6]The court of appeals did not pass upon the validity of the agents' actions in conducting a cursory search of respondent's home and in requesting respondent's wife to come into the living room. We note,

Amendment requires officers to obtain a warrant before effecting an arrest entry. The conduct of the agents inside respondent's home is therefore irrelevant to the retroactivity question before the Court. Furthermore, respondent's statements were the fruits, not of any arguably improper actions by the agents after their entry, but of respondent's arrest, which clearly was lawful because the agents had probable cause to believe that respondent had committed a crime. Thus, whether or not the agents' post-entry conduct was reasonable under the Fourth Amendment, that conduct may not serve as the basis for suppressing respondent's statements. See our opening brief at 13 n.6.

3. There is no merit to respondent's contention that he is entitled to benefit from the rule announced in *Payton* and *Prescott* because his case was pending on direct review when those cases were decided. In *Desist* v. *United States*, 394 U.S. 244, 253 (1969), the Court rejected the argument that a new Fourth Amendment decision should be applied retroactively to cases pending on direct review, noting that "[b]oth the deterrent purpose of the exclusionary rule and the reliance of law enforcement officers focus upon the time of the search, not any subsequent point in the prosecution, as the relevant date." See *Williams* v. *United States*, 401

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however, that the courts of appeals have recognized that when officers arrest a person inside a residence they may conduct a brief inspection of the premises when they reasonably believe that other persons might be present who could pose a danger to them. See, *e.g.*, *United States* v. *Gardner*, 627 F. 2d 906, 909-910 (9th Cir. 1980); *United States* v. *Dien*, 609 F. 2d 1038, 1047 (2d Cir. 1979), adhered to on rehearing, 615 F. 2d 10 (1980); *United States* v. *Cravero*, 545 F. 2d 406, 417-418 (5th Cir. 1976), cert. denied, 429 U.S. 1100 (1977); *United States* v. *Rich*, 518 F. 2d 980, 985-986 (8th Cir. 1975). Similarly, it is a reasonable security precaution for officers arresting an individual inside a residence to exercise control over other persons present. Cf. *Michigan* v. *Summers*, No. 79-1794 (June 22, 1981), slip op. 10-11 & n.17.

U.S. 646, 656-659 (1971) (plurality opinion).[7] Thus, as we have shown in our opening brief (at 34-37), because the exclusion of reliable evidence undermines the factfinding objective of the criminal trial and because the deterrent purpose of the exclusionary rule is not served by retroactive application, there is no valid reason to apply new Fourth Amendment decisions retroactively to cases pending on direct review. All that is accomplished thereby is the freeing of a criminal.

For the foregoing reasons and the reasons stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

FEBRUARY 1982

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[7]Respondent cites (Br. 25 n.21) *Ker* v. *California*, *supra*, *Fahy* v. *Connecticut*, 375 U.S. 85 (1963), and *Stoner* v. *California*, 376 U.S. 483 (1964), as general authority for the retroactive application of a new Fourth Amendment rule to cases pending on direct review. But as the Court pointed out in *United States* v. *Peltier*, *supra*, 422 U.S. at 535 n.5, "[t]hose cases were decided without discussion of retroactivity principles, and they have not been interpreted as establishing any retroactivity limitation of general applicability."